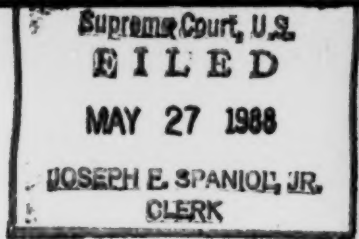


87-1969



No.

**In the Supreme Court of the
United States**

Term, 198

THE BOROUGH OF BERWICK, DANIEL DE-
FINNIS, SR., THOMAS METZ, CARMEN BUTERA,
and HERMAN DAVIDSON, Members of the Zoning
Hearing Board of the Borough of Berwick,
Petitioners

vs.

GLEN M. NEIDERHISER and GREGORY C.
BROWN, t/a PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO,
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

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Statement of Question Presented for Review

STATEMENT OF QUESTION PRESENTED FOR
REVIEW

Does the Denial of a request for a special exception under a Borough Zoning Ordinance by a Municipal Zoning Hearing Board give rise to a cause of action under 42 U.S.C. §1983 for damages and injunctive relief against the Zoning Board and its members on the basis that there was a denial of substantive due process because the Zoning Board's decision was arbitrary and irrational, and that there was a violation of the First Amendment because the Zoning Board's decision was based on opposition to the rental of obscene videotapes, when state law provides for plenary and timely review of the Zoning Board's decision in the state court system?

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Petition

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

The Petitioners, THE BOROUGH OF BERWICK, DANIEL DEFINNIS, SR., THOMAS METZ, CARMEN BUTERA and HERMAN DAVIDSON, members of the Zoning Board of the Borough of Berwick, respectfully pray that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 1, 1988.

*Opinions Below*REFERENCE TO THE OPINIONS DELIVERED IN
THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported as *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3rd Cir. 1988).

The opinion of the United States District Court for the Middle District of Pennsylvania, *Glen M. Neiderhiser v. The Borough of Berwick*, Civil No. 86-1651 (M.D. Pa., filed June 24, 1987), is not officially reported. The opinion of the District Court is printed in the Appendix.

The opinion and order of the Court of Common Pleas of Columbia County, *Glen M. Neiderhiser and Gregory C. Brown, t/a Progressive Enterprises, t/a Hollywood Stereo and Video v. The Zoning Hearing Board of the Borough of Berwick*, Case No. 906-1986 (In the Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch, filed April 22, 1987), which adjudicated Plaintiff's appeal from the Berwick Zoning Hearing Board's initial adverse decision denying the application for special exception and which remanded the matter to the Zoning Hearing Board for further proceedings consistent with its opinion, is not officially reported. This opinion of the Columbia County Court of Common Pleas is printed in the Appendix.

The decision of the Berwick Zoning Hearing Board of August 7, 1986 which initially denied the Plaintiff's request for a special exception and the decision of the Zoning Hearing Board of May 13, 1987 after remand from the Columbia County Court wherein the Board granted the special exception are set forth in the Appendix.

*Jurisdiction***JURISDICTION**

1. The Opinion and judgment of the Court below was filed on March 1, 1988.

2. In response to Defendants' Motion for Stay of Mandate Pending Petition For Writ of Certiorari, the Court of Appeals for the Third Circuit entered the following Order dated April 4, 1988 staying the issuance of the mandate:

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 30, 1988.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), §2101(c).

*Statutes and Constitutional Provisions Involved*STATUTES AND CONSTITUTIONAL PROVISIONS
INVOLVED

The constitutional provisions involved are the First Amendment and Fourteenth Amendment of the United States Constitution. The statutes involved are 42 U.S.C. §1983 and the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101 *et seq.* The ordinances involved are the Berwick Borough Zoning Ordinance and the Berwick Obscenity Ordinance No. 1158. The pertinent text of the foregoing is set forth in the Appendix.

*Statement of the Case*STATEMENT OF THE CASE

On June 30, 1986, HOLLYWOOD VIDEO (sometimes hereinafter "Plaintiff") entered into a Lease to rent property at 906 Market Street in the Borough of Berwick for use as a video rental store. The property had non-conforming use status as a commercial structure under the zoning ordinance of the BOROUGH OF BERWICK (sometimes hereinafter the "Borough"). On July 25, 1986, HOLLYWOOD VIDEO applied for a special exception to change the use of the premises from one non-conforming use to another. HOLLYWOOD VIDEO sought permission to operate a video rental store on the premises.

The request for special exception was denied by the BOROUGH'S Zoning Hearing Board, which failed to make the required findings of fact and conclusions of law in support of its decision as required by the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101 *et seq.* HOLLYWOOD VIDEO filed a zoning appeal under the Municipalities Planning Code to the Court of Common Pleas of Columbia County, asking that Court to review and reverse the decision of the Zoning Hearing Board and to grant the special exception to operate a video rental store which the Board had denied.

At the same time the Plaintiff, GLEN M. NEIDERHISER and GREGORY C. BROWN, t/a PROGRESSIVE ENTERPRISES, t/a HOLLYWOOD STEREO AND VIDEO ("HOLLYWOOD VIDEO"), also commenced this civil rights action in the Federal Court. The Defendants are the BOROUGH OF BERWICK, and DANIEL

Statement of the Case

DEFINNIS, SR., THOMAS METZ, CARMEN BUTERA and HERMAN DAVIDSON, members of the Zoning Hearing Board of the BOROUGH OF BERWICK.

The BOROUGH and HOLLYWOOD VIDEO attempted to resolve their differences and attempted to negotiate an agreement to resolve the zoning appeal. The BOROUGH made a settlement proposal but the proposal was never agreed to by HOLLYWOOD VIDEO. Included in the settlement proposal, which was never executed, was a provision that HOLLYWOOD VIDEO would agree to comply with the BERWICK Obscenity Ordinance No. 1158.

Subsequent to the filing of Plaintiff's §1983 Complaint, the Court of Common Pleas of Columbia County remanded HOLLYWOOD VIDEO's state zoning appeal to the BERWICK Zoning Hearing Board with direction that the Board hold a second hearing, make a stenographic record addressing the zoning issues raised in the Court's opinion, and make specific findings of fact and conclusions of law to support its decision as required by the Pennsylvania Municipalities Planning Code, *supra*.

In accordance with the Court's direction, the Zoning Hearing Board held a second hearing, at which it rendered a decision which granted HOLLYWOOD VIDEO the special exception it was seeking.

In the pending Federal Court proceeding, the Plaintiff had filed a Motion for Summary Judgment. Defendants opposed the Motion and in their Brief argued, *inter alia*, that the case should be dismissed for want of jurisdiction because there was no longer a case or controversy, since the Zoning Hearing Board, at the second hearing held at the direction of the state court, had granted the Plaintiff

Statement of the Case

the special exception it was seeking from the Board. Plaintiff filed a Reply Brief which addressed the case or controversy issue. By Memorandum and Order filed on June 24, 1987, the District Court dismissed this §1983 action on the basis that there was no longer a pending actual case or controversy and hence the Court lacked jurisdiction, in view of the fact that the Zoning Hearing Board had granted Plaintiff the special exception it had sought from the Board.

Plaintiff then filed an appeal to the Court of Appeals for the Third Circuit, which reversed the decision of the District Court. The Third Circuit held that there still was an actual case or controversy because:

...Hollywood has stated a cause of action for violations of its due process and free expression rights under §1983, and that its claim for damages flowing therefrom demonstrates that a live case or controversy exists. It does not matter that the Board has since reversed itself and granted the zoning exemption; if Hollywood's allegations are true and the denial deprived Hollywood of any constitutional right, even temporarily, the denial would be compensable (the damages flowing therefrom would cover the period running from the denial through the time the exemption was finally granted and Hollywood was allowed to open). Since a viable claim for damages insures that a live controversy exists, [citations omitted], and we find that Hollywood has set forth a claim for damages, we conclude that Hollywood has adequately set forth a case or controversy.

840 F.2d at 218-219.

On or about June 1, 1987, HOLLYWOOD VIDEO opened for business in the BOROUGH OF BERWICK.

Statement of the Case

The record shows that at no time did the BOROUGH institute proceedings or threaten to institute proceedings against the Plaintiff under the BERWICK Obscenity Ordinance No. 1158. In fact, it is undisputed in the record that the obscenity ordinance, since its enactment in 1982, has not been applied to or enforced against anyone.

It should be noted that the obscenity ordinance is not a criminal ordinance. Rather, it merely provides for the commencement of civil legal proceedings by the BOROUGH Solicitor, with the permission of the BOROUGH Council, to obtain a judicial order to abate trafficking in "obscene" material which is proscribed by the ordinance.

The Court of Appeals for the Third Circuit found that the reference to the obscenity ordinance in the course of the zoning proceedings by Zoning Board members and in the settlement proposal proffered by BERWICK BOROUGH was sufficient to create a live case or controversy under §1983 with respect to the constitutionality of the obscenity ordinance and hence a case or controversy as to whether Plaintiff's First Amendment rights, as well as substantive due process rights, had been violated by the Defendants in the zoning proceedings.

Reasons for Allowance of the Writ

REASONS FOR ALLOWANCE OF THE WRIT

The Opinion of the Court of Appeals for the Third Circuit should be reviewed by the United States Supreme Court for the reasons hereinafter set forth.

**Conflict With Other Federal Courts of
Appeals**

The holding of the Court of Appeals for the Third Circuit that a municipal zoning board and its members may be sued under §1983 for damages and injunctive relief on the basis that a decision rendered by the board which is arbitrary or irrational violates substantive due process, despite the existence under state law of plenary and timely state judicial review of the zoning board's decision, is in direct conflict with the decisions of the Courts of Appeals of the First and Eleventh Circuits. The Third Circuit decision is in conflict with the Court of Appeals for the Ninth Circuit with respect to the First Amendment claim.

The aforesaid Circuit Courts have held that litigants may not ordinarily obtain Federal Court review of local zoning disputes under §1983 on the basis that the local zoning board's decision is arbitrary or irrational or violative of the First Amendment when the state offers administrative and judicial remedies adequate to correct any erroneous results reached by the local zoning board or local zoning officials. *Raskiewicz v. Town of New Boston*, 754 F.2d

Reasons for Allowance of the Writ

38 (1st Cir. 1985), *cert. denied* 474 U.S. 845, 106 S. Ct. 135, 88 L. Ed. 2d 111 (1985); *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (1st Cir. 1984); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied* 459 U.S. 989, 103 S. Ct. 345, 74 L. Ed. 2d 385 (1982); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983); *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir. 1985); *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987).

In the case at bar, the Third Circuit Court of Appeals held as follows:

First, we believe that Hollywood alleged a viable due process violation. As the Supreme Court has stated, the due process clause of the Fourteenth Amendment protects against arbitrary or irrational government action, *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986); *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974), including zoning decisions. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 562, 50 L. Ed. 2d 450 (1977). In this case, Hollywood alleged that the exemption was denied for no reason other than that it possessed a certain type of movie for rent or resale. In our opinion, this allegation, although inartfully drawn, plainly states a cause of action based on a violation of due process, since the denial based on nothing other than the subject matter of the films it distributed would be arbitrary or irrational. Therefore, if Hollywood can successfully demonstrate that

Reasons for Allowance of the Writ

the Defendants arbitrarily or irrationally denied the exemption, visiting a constitutional deprivation on it, then Hollywood may prevail on its due process claim. See, E.G., *Bello v. Walker*, No. 87-3504 (3rd Cir. March 1, 1988).

Second, we believe that Hollywood has also stated a cause of action for a violation of its right of free expression under the first amendment. As the first amendment embraces the production, distribution and exhibition of films and other forms of entertainment, *Schad v. Borough of Mt. Ephriam*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S. Ct. 777, 780-81, 96 L. Ed. 1098 (1952), this protection is afforded to Hollywood's distribution of home videos.

840 F.2d at 217-218.

It should be noted that the sole Supreme Court zoning case cited in support of the aforesaid holding, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, was not a substantive due process case at all but an equal protection zoning case in which the Court upheld the local governing board's denial of a request for the rezoning of certain land within a village and rejected the contention that the board's decision was racially discriminatory in violation of the equal protection clause of the Fourteenth Amendment. The Court in *Arlington Heights* held that proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause of the Fourteenth Amendment, and that official action could not be held unconstitutional solely because it results in a racially disproportionate impact. Thus, the Third Circuit's

Reasons for Allowance of the Writ

citation to the *Arlington Heights* case provides no support for its substantive due process holding in the case *sub judice*.

Furthermore, the Third Circuit's decision in the case at bar is in conflict with its own reasoning in *Cohen v. City of Philadelphia*, 736 F.2d 81 (3rd Cir. 1984), *cert. denied* 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. 2d 360 (1984), in which the Court held that substantive mistakes by administrative bodies in applying local ordinances do not create a federal constitutional claim so long as correction is available by the state's judiciary. The Third Circuit in *Cohen*, in rejecting a §1983 claim against the City of Philadelphia and its Civil Service Commission, stated:

Any other holding would lead to the danger that:

'any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. . . .

Ellis v. Hamilton, 669 F.2d 510, 514 (7th Cir.), *cert. denied*, *sub nom. Ellis v. Judge of the Putnam Circuit Court*, 459 U.S. 1069, 103 S. Ct. 488, 74 L. Ed. 2d 631 (1982). In this case, because Pennsylvania has provided a means of correcting the errors that will sometimes occur at the administrative level, no deprivation without due process of law has occurred.

Reasons for Allowance of the Writ

Cohen argues that to require him to proceed in state court is to require a section 1983 plaintiff to exhaust his state remedies before proceeding in federal court, contrary to *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). Exhaustion is not however the issue. The necessary predicate to the claim for relief is that there has been a denial of due process under state procedures. Our holding is that the state has provided Cohen with due process by providing 'reasonable remedies to rectify a legal error by a local administrative body,' *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.), cert. denied, 459 U.S. 989, 103 S. Ct. 345, 74 L. Ed. 2d 385 (1982), and that therefore he has not alleged a constitutional violation entitling him to sue under section 1983. Although Cohen has waived his state law avenues of relief by his inaction, the very existence and apparent efficacy of such remedies defeats his claim that he was deprived of property without due process of law.

736 F.2d at 86-87.

The Court of Appeals for the First Circuit has consistently held, in direct conflict with the Third Circuit's decision in the case at bar, that §1983 cannot be utilized to challenge a zoning board's decision on substantive or procedural due process grounds by alleging that the board's decision was arbitrary, irrational, or made in bad faith, as long as state law provides for adequate review of the zoning board's decision by the state judicial system. For example, in *Raskiewicz v. Town of New Boston*, *supra*, the Court of Appeals for the First Circuit held as follows:

We begin by noting that this Court has repeatedly said that Federal Courts do not sit as a super zon-

Reasons for Allowance of the Writ

ing board or a zoning board of appeals. See, e.g., *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), cert. denied 459 U.S. 989, 103 S. Ct. 345, 74 L. Ed. 2d 385 (1982). While the Supreme Court has yet to provide precise analysis concerning claims of this sort, we feel confident that where, as here, the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain Federal Court review of local zoning and planning disputes by means of 42 U.S.C. §1983.

Raskiewicz argues that 'because of the presence of bias, the present case is not governed by the general rule prohibiting ordinary land use disputes from being litigated under §1983.' Charges of bias, bad faith and other 'opprobrious epithets of malice,' however, are common place in cases of this nature. *Creative Environments, Inc.*, 680 F.2d at 830. See, *E.G., Chipplin*, 712 F.2d at 1527-28; *Cloutier*, 714 F.2d at 1189. If all that were required to secure federal jurisdiction were loose claims of conspiracy and corruption, virtually any case of this type could be brought into the Federal Court.

754 F.2d at 44.

In *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (1st Cir. 1984), the First Circuit held that a property owner who lost an option to purchase a tract of land due to the passage of time necessary to obtain judicial correction in the state courts of an allegedly unreasonable and arbitrary decision by a town planning board which denied the

Reasons for Allowance of the Writ

property owner's subdivision application did not state a substantive or procedural due process claim under the Fourteenth Amendment cognizable under Section 1983. In direct contradiction of the Third Circuit's holding in the case at bar, the First Circuit in *Alton* stated:

Appellants were not denied due process. New Hampshire law provided them with the right to appeal to the courts from the Board's denial of a permit. When they appealed, their contentions were heard and indeed, relief was ordered in their favor. It is true that judicial correction took time, but the passage of time is an inevitable part of procedural due process. Expense and collateral injury may unfortunately result if one is forced to appeal in order to secure one's rights, but it is hard to see how this kind of harm can be eliminated. To permit the members of a lower tribunal, whether a planning board or other administrative or judicial body, to be haled into court every time they are later found to have erred would create a whole new range of problems outstripping those the procedure would be intended to resolve.

745 F.2d at 732.

In *Creative Environments, Inc. v. Estabrook*, *supra*, the First Circuit, in affirming the grant of summary judgment against the developer who averred that his due process rights had been violated by a town's alleged overall distortion of the existing statutory and regulatory scheme in rejection of the developer's residential housing development plan, stated as follows:

Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of CEI's characterizations of it and

Reasons for Allowance of the Writ

of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute—at least when not tainted with fundamental procedural irregularity, racial animus, or the like—which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less 'distort' the state scheme under which they operate. A Federal Court, after all, 'should not . . . sit as a zoning board of appeals.' *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12, 94 S. Ct. 1536, 1542, 39 L. Ed. 2d 145 (1974) (Marshall, J. dissenting). *Every* appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under §1983. As has been often stated, 'the violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.' [Citations omitted.] [Emphasis in original.]

680 F.2d at 833.

In *Chiplin Enterprises, Inc. v. City of Lebanon*, *supra*, the First Circuit again refused to recognize a claim of constitutional dimensions premised on an allegation that

Reasons for Allowance of the Writ

the Plaintiff had been arbitrarily and irrationally refused a building permit by municipal authorities even though he had met all reasonable requirements and was entitled to such a permit under state law. The First Circuit stated that "a mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the State Courts are available to correct the error." 712 F.2d at 1528.

In *Cloutier v. Town of Epping, supra*, Plaintiffs had contended that the zoning law was never validly enacted in Epping, that the New Hampshire Supreme Court had held the zoning scheme unenforceable, and that the Defendant Municipality and its officials' continued reliance on the zoning laws violated §1983 by depriving Plaintiffs of due process and equal protection of the laws. The Plaintiffs further contended that the Defendants engaged in a number of malicious delaying tactics which impeded Plaintiffs' ability to proceed with their development plans. The Court of Appeals for the First Circuit affirmed the District Court's dismissal of the Complaint and held that the application—or arbitrary misapplication—of the state's zoning laws could not form the basis for a due process claim under §1983 when state law provided adequate remedies to a person so aggrieved. 714 F.2d at 1189-1190.

All of the aforesaid cases are in conflict with the holding and mode of analysis of the Court of Appeals for the Third Circuit in the case at bar as to the circumstances under which zoning disputes can be litigated as constitutional claims under Section 1983.

The Courts of Appeals for the Ninth Circuit and Eleventh Circuit have rendered decisions consistent with the First Circuit's approach to zoning cases. In *Rymer v.*

Reasons for Allowance of the Writ

Douglas County, supra, the Court of Appeals for the Eleventh Circuit held that property owners who brought suit against a county and county officials, alleging that the officials wrongfully issued a building permit upon land they knew or should have known was unsuitable for septic tank systems, which resulted in the inability of property owners to use a dwelling as a residence, failed to aver conduct which was sufficiently egregious to be constitutionally tortious. In order to aver a violation of substantive due process, the Court stated that there must have been a deprivation of a federal constitutionally protected interest, and the deprivation must have been the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation. 764 F.2d at 801.

The Court of Appeals for the Ninth Circuit in *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987), held that abstention was proper in a Section 1983 challenge to a Board of Adjustment's refusal to grant a permit for female "go-go" and flash dancing where a First Amendment challenge could be raised in the state court review of the Board of Adjustment's decision.

The Court of Appeals for the Fifth Circuit has taken an approach to zoning cases different from both the First and Third Circuits. In *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986), *cert. denied* 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d 566 (1987), the Court of Appeals for the Fifth Circuit held that federal judicial interference with a state zoning board's decision is proper only if the governmental body could have had no legitimate reason for its decision; however, federal interference on substantive due process grounds is appropriate under this standard even if the state provides an adequate state remedy to redress the alleged wrong in state court.

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The Court of Appeals for the Fourth Circuit appears to have been on both sides of this issue and seems to have rendered decisions which are in conflict. *Compare Meredith v. Talbot County, Maryland*, 828 F.2d 228 (4th Cir. 1987) (zoning involves important matters of state and local policy which under the Burford abstention doctrine should remain a purely state affair as long as the state provides a regulatory scheme for impartial and fair administrative determinations subject to expeditious and adequate judicial review) *with Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (where there is fairly alleged a basis for finding either abuse of discretion or caprice in a zoning decision, a Fourteenth Amendment due process claim is properly stated).

Given the conflict—indeed confusion—among the Circuits and even internally within some Circuits, it is respectfully submitted that there is a need for this Court to resolve the issue presented in the case at bar.

Need for Supreme Court Resolution of an Important Question of Federal Law

The Court of Appeals for the First Circuit in *Raskiewicz v. Town of New Boston*, *supra*, noted that the Supreme Court has yet to provide precise analysis concerning the circumstances under which and the extent to which Federal Courts should review local zoning disputes under §1983 when there are adequate state remedies for review of zoning board decisions, 754 F.2d at 44. The Court of Appeals for the Third Circuit in the case at bar has decided this important question of federal law which has not been, but should be, settled by the United States Supreme Court.

To allow Plaintiffs who have received an adverse zoning board decision and who have available plenary and timely review of that decision by the state court system to bring a federal action under §1983 against the zoning board and its members for damages and injunctive relief has serious consequences with respect to a state's ability to rationally and effectively administer and apply its zoning laws. An interpretation of Section 1983 and constitutional doctrine which allows a litigant simply to ignore a system of adequate state review of the zoning board's decision or, as in the case at bar, simultaneously litigate his zoning dispute in the state and federal courts, presents serious questions of federalism and comity which ought to be addressed by this court.

The decision of the Court of Appeals for the Third Circuit in the case *sub judice* opens up the floodgates to

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the bringing of what heretofore would have been state law zoning disputes into the federal courts as constitutional torts. The Third Circuit's decision effectively constitutionalizes the *substance* of zoning hearing board decision-making. This will result in both state and federal courts undertaking simultaneously similar reviews of zoning board decisions to determine at least initially whether the zoning board's decision is in accordance with the criteria set forth in the local zoning ordinance and in the state law, in this case the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101 *et seq.*, which is the Pennsylvania Statute which establishes the basic rules which a municipality must follow in enacting, administering, enforcing and amending a zoning ordinance.

Under the circumstances presented herein, federal courts should abstain from concurrently deciding zoning disputes where the state provides a regulatory scheme for impartial and fair administrative determinations which are subject to expeditious and adequate state judicial review. *Meredith v. Talbot County*, 828 F.2d 228 (4th Cir. 1987); *See World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987). This Court has held that abstention is required in civil matters if state interests are so important "that the exercise of the federal judicial power would disregard the comity" between state and federal governments. The abstention doctrine prevents federal interference in civil proceedings where important state interests are involved. *Pennzoil Co. v. Texaco*, U.S. , 107 S. Ct. 1519, 95 L. Ed. 2d 1, 15 (1987); *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 97 S. Ct. 1911, 52 L. Ed. 2d 486 (1977); *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977); *Huffman v. Pursue, Ltd.*,

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420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975); *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971). In addition, abstention avoids unwarranted determinations of federal constitutional questions. *Pennzoil Co. v. Texaco*, *supra*.

In the case at bar, Plaintiff was allowed to exercise simultaneously his right to state judicial review of the zoning board's decision by appealing the decision of the zoning board to the Columbia County Court of Common Pleas, while at the same time pursuing his §1983 claim for damages and injunctive relief against the zoning board in Federal Court. While the federal action was pending, the Court of Common Pleas rendered a decision sending the matter back to the zoning hearing board with direction to make a factual record with respect to the proper zoning criteria governing whether the special exception Plaintiff had requested should be granted. At this second zoning hearing held at the direction of the Court of Common Pleas, the zoning hearing board granted, without condition, the special exception which Plaintiff had been seeking.

This action by the zoning board caused the federal District Court to dismiss this Section 1983 case on the ground there was no longer a live case or controversy pertaining to the zoning dispute which was the subject matter of the Plaintiff's §1983 Complaint. However, the Third Circuit Court of Appeals disagreed, finding that the Plaintiff had a cause of action for damages against the board and its members for the delay between the zoning board's initial decision improperly denying the special exception requested by the Plaintiff and the granting of the special exception by the zoning board after the Court of

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Common Pleas had remanded the matter to the zoning board for further consideration.

The Third Circuit's decision not only fails to take into account the principles of comity and federalism established by this Court, but it also is in error as to the circumstances under which a zoning board's decision can be viewed as having resulted in the deprivation of a federal constitutionally protected interest. In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), this Court established the test for substantive due process violations and held that conduct which "shocks the conscience" or "offends the community's sense of fair play and decency" is prohibited by the due process clause of the Fourteenth Amendment. It is respectfully submitted that an arbitrary or irrational decision by a zoning board does not "shock the conscience" or "offend the community's sense of fair play and decency" so long as the state provides for plenary and timely judicial review of the zoning board's decision, as does the State of Pennsylvania in its Municipalities Planning Code, 53 P.S. §§10101 *et seq.* As long as the state has devised a system to administer its zoning laws that allows adequate and expeditious judicial review of the decision made by the local zoning board, which should not be viewed as final given the right of the losing party to seek immediate and plenary review in the Pennsylvania Courts, there is no federal constitutional violation.

The Pennsylvania Municipalities Planning Code, *supra*, which establishes the basic rules which a municipality must follow in enacting, administering, enforcing and amending its zoning ordinance, in conjunction with the aforesaid system of judicial review of decisions of the local zoning board, provides a system for arriving at final

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zoning decisions that comports fully with federal constitutional requirements. The fact that the initial decision-maker in the system—namely, the local zoning board which acts in a quasi-judicial fashion—renders an arbitrary or irrational decision, or one based on impermissible factors violative of the First Amendment, should not give rise to a §1983 claim, given the timely availability of adequate state judicial review. The state has provided for judicial correction of any initial improper decision by the local zoning board. Moreover, to allow federal judicial intervention into that process, or to pre-empt that process of state judicial review in the form of §1983 actions for damages and/or injunctive relief against the board and its members, constitutes an unwarranted federal interference with the state administration of its zoning laws.

It is important to note that in the case at bar the issue was *not* a challenge to the constitutionality of the local zoning ordinance, or a challenge to the adequacy of the system of review of zoning decisions provided for by the state in the state courts. Rather, this is an attempt to use §1983 to impose damages and injunctive relief on the zoning board and its members in their *application* of the zoning ordinance to the specific facts of the Plaintiff's case. Under the Third Circuit decision in the case at bar, it will be possible in almost every case for the losing party before a zoning board not only to file its appeal in the state court system but also simultaneously to file a §1983 claim against the board and its members seeking damages and injunctive relief, by averring that the board's decision was arbitrary, irrational or based on impermissible factors (such as political motivation by the board or personal animosity of board members toward the applicant).

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Thus, under the Third Circuit's decision, the federal courts will have become a super zoning board and zoning board of appeals and will have assumed responsibility for the administration of local zoning ordinances and their specific application in any given case. The federal courts will have supplanted the state courts which heretofore have been charged with that responsibility and played that role.

As previously noted, this result is inconsistent with this Court's pronouncements on what constitutes substantive due process violations as well as this Court's decisions as to the proper role of the federal courts in the federal system. As stated by this Court in its adjudication of the question of whether conduct by state officials constituted a federal constitutional deprivation, it is not the intent of this Court to make Section 1983 or the Fourteenth Amendment a system of law to be superimposed upon whatever systems may already be administered by the state. See *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

Yet if the Third Circuit's decision in the case at bar is allowed to stand, Section 1983 will become a tool which will supplant the existing state system for review of local zoning board decisions and will inject a great deal of uncertainty, if not chaos, into the state's system for administering its zoning laws.

Conclusion

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Amendments I and XIV

APPENDIX

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5505

NEIDERHISER, Glen M. and
BROWN, Gregory C.,
t/a PROGRESSIVE ENTERPRISES,
t/a HOLLYWOOD STEREO AND VIDEO,
Appellants.

v.

THE BOROUGH OF BERWICK,
DEFINNIS, Daniel, Sr.,
METZ, Thomas, BUTERA, Carmen,
and DAVIDSON, Herman, members
of the Zoning Hearing Board
of the Borough of Berwick.

On Appeal from the United States District
Court for the Middle District
of Pennsylvania
(D.C. Civil No. 86-1651)

Argued December 17, 1987

Before: GIBBONS, *Chief Judge*,
SLOVITER and COWEN,
Circuit Judges.

(Filed March 1, 1988)

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OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal arises from an order of the district court, which dismissed plaintiffs' claims brought pursuant to 42 U.S.C. §1983 on grounds that there was no viable case or controversy before the court, and therefore no jurisdiction. Because we find that plaintiffs did allege a cause of action encompassing a viable case or controversy, we conclude that the district court had jurisdiction, and will reverse.

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I.

In June of 1986, Hollywood Video ("Hollywood")¹ entered into an agreement to lease the premises at 906 Market Street in the Borough of Berwick ("Berwick").² Hollywood's intent was to establish at that location a store for the purpose of renting and selling movies, video equipment and related supplies. As the intended use did not fall within those permitted by the area zoning plan, the zoning officer would not grant her approval. Therefore, on July 25, 1986, Hollywood applied to the Berwick Zoning Hearing Board ("Board") for a special exemption based on the fact that the property had been operated on a commercial basis for the past 30 years and that the proposed use was consistent with prior non-conforming (i.e., commercial) use.

The Board denied the application on August 13, 1986. Although it did not articulate a reason for the denial, a transcript of the hearing reflects that in considering the application the Board focused on the fact that a significant portion of Hollywood's business consists of the sale and rental of adult movies.³ A fair reading of the questioning

¹ Glen Neiderhiser and Gregory Brown, the individual plaintiffs involved herein, trade as Progressive Enterprises and as Hollywood Stereo and Video. For the sake of convenience, we will refer to them collectively as "Hollywood".

² Except where otherwise noted, we will refer to all the named defendants as "Berwick".

³ Hollywood stated that twenty percent of its gross rental sales (at its other locations) consists of adult movies. These movies are displayed in a separate location from the other movies (usually in another room) where they are not accessible to minors or to those who have no interest in these films.

U.S. Court of Appeals Opinion

and comments of the Board members at the hearing suggests that they would have viewed the application more favorably if Hollywood did not purvey movies of this genre.

Subsequent to the denial, the parties attempted to negotiate a settlement of the dispute. As part of the settlement agreement, Berwick included a provision mandating Hollywood's compliance with Borough of Berwick Ordinance No. 1158 ("Ordinance 1158"),⁴ which was enacted by Berwick in 1982 in order to prohibit "the sale of lewd, obscene, pornographic publications and material, and/or the establishment of adult book stores" in the borough. App. at 40. Viewing the statute as an unconstitutional attempt to limit its business, Hollywood refused to execute the stipulation with the provision relating to Ordinance 1158. Hollywood then appealed the Board's decision to the Court of Common Pleas of Columbia County, pursuant to the Pennsylvania Municipalities Planning Code, 53 Pa. Cons. Stat. Ann. §10101 *et seq.*

On November 20, 1986, at approximately the same time it appealed the Board's original decision to the court of common pleas, Hollywood filed this action setting forth three separate causes of action under section 1983. In its first count, Hollywood alleged that Ordinance 1158 was unconstitutional in that it was vague, served no legitimate governmental purpose, had no rational basis, and thereby deprived Hollywood of its right to free expression and

⁴ Paragraph eight of the proposed Stipulation of Settlement states:

The Appellant shall comply with the Borough of Berwick Ordinance No. 1158 with respect to pornography and will not operate and maintain the premises as an Adult Book Shop or Adult Firm [sic] Viewing Premises.

U.S. Court of Appeals Opinion

substantive due process under the first and fourteenth amendments. In addition to damages (in the form of lost profits and rents paid on the Market Street premises before the exemption was issued) and attorneys fees (both for the section 1983 action and the costs of litigating after the alleged improper denial of the exemption), Hollywood sought a judgment declaring the ordinance unconstitutional. Fearing enforcement of the ordinance against it, Hollywood also sought an injunction preventing such an occurrence. In its third count,⁵ Hollywood alleged that the individual members of the Zoning Board through their denial of the exemption, and the Borough of Berwick through its adoption of the decision, deprived Hollywood of its first and fourteenth amendment rights of free expression. As to this count, Hollywood sought damages and an order directing the defendants to issue the exemption.

On April 15, 1987, Hollywood filed a motion for summary judgment, asking that the ordinance be declared unconstitutional. Soon thereafter, on April 22, the court of common pleas reversed the denial of the zoning exemption and remanded the matter to the Board for specific findings of fact and conclusions of law. On remand, the Board made the findings of fact mandated by the court of common pleas, and granted the exemption. Hollywood opened for business at the Market Street location on June 1, 1987.

On June 24, 1987, the district court—noting that Hollywood had been granted the zoning exemption—denied Hollywood's motion for summary judgment, and instead dismissed the entire action on the ground that it lacked jurisdiction. The district court reached this con-

⁵ Hollywood withdrew its second count, based on equal protection grounds, early in the proceedings.

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clusion because in its view Hollywood had failed to demonstrate that it faced an imminent threat of enforcement by the borough of the alleged unconstitutional ordinance. Hollywood appeals the dismissal to this Court.

II.

The issue before us is whether the district court erred in determining that there was no live case or controversy before the court, thereby divesting it of jurisdiction. As the district court's holding in this respect involves the interpretation and application of a legal precept, our review is plenary. *United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.), *cert denied*, 474 U.S. 971 (1985).

III.

The district court dismissed Hollywood's action for want of jurisdiction because it concluded there was no live case or controversy before the court. The district court reached this conclusion since it found that the allegations that the ordinance would be enforced against Hollywood were too speculative and therefore "insufficient . . . to present a case in controversy." App. at 48. Hollywood argues that this determination was erroneous for several reasons, each of which we will address in turn.

A.

Hollywood first argues that its motion for summary judgment (seeking a declaration that Ordinance 1158 was unconstitutional) only related to one of the three causes of action set forth in the complaint. Hollywood asserts that the merits of the other counts were not before the court below and should not have been addressed and dismissed

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sua sponte. We reject this argument as without merit and contrary to law.

The subject matter jurisdiction of a federal court is limited by Article III, section 2 of the Constitution, which requires that there exist in the matter before the court a live case or controversy. If there is no justiciable case or controversy, the federal court is divested of jurisdiction and may not consider the case. Contrary to Hollywood's position that a sua sponte determination of jurisdiction was improper, any time a possible lack of a controversy as to any or all claims is brought to the court's attention, whether through a party or through its own discovery, the court is required to resolve the issue. *Trent Realty Assoc. v. First Fed. Sav. & Loan Ass'n.*, 657 F.2d 29, 36 (3d Cir. 1981); Fed.R.Civ.P. 12(h)(3). Therefore, the district court's consideration of the jurisdictional issue was entirely appropriate.⁶

Hollywood also argues that, contrary to the district court's determination, it did have a reasonable expectation that the allegedly unconstitutional ordinance would be enforced against it. In support of this assertion, Hollywood relies on the fact that the terms of the settlement proposed by Berwick included a provision compelling Hollywood to

⁶ While the district court's consideration of the jurisdictional issue sua sponte was proper, the court did not afford the parties the opportunity to brief or present evidence on this issue. We find this lack of opportunity to be heard to be improper. The court below should have allowed Hollywood sufficient time to present evidence or otherwise respond on the issue of jurisdiction before it determined that none existed. See *Local 336, American Fed. of Musicians, AFL-CIO v. Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973); *Prakish v. American University*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984). However, in light of our determination that there was a live controversy, see *infra*, we need not remand on this issue.

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comply with the provisions of the ordinance. Hollywood avers that if enforcement of the statute was not contemplated, this provision would not have been included. Hollywood also asserts that the expectation of enforcement still exists, so long as the statute remains unchallenged.

Berwick counters that Hollywood lacks standing because it has failed to show an injury or a threat of enforcement. Berwick also argues that the failure of the borough to seek enforcement against Hollywood, and the uncertain nature of Hollywood's inventory and the borough's reaction to that inventory, renders the dispute unripe for adjudication.

We conclude that based on the allegations and other matters of record below, there was sufficient evidence that Berwick attempted to compel Hollywood to comply with Ordinance 1158 such that Hollywood has satisfied its burden of showing imminent threat of enforcement of the ordinance. Central to our conclusion is the fact that Berwick sought to induce Hollywood to voluntarily comply with Ordinance 1158 by including a provision to this effect in the stipulation of settlement. Berwick explicitly made compliance with the ordinance a condition to the granting of the exemption. Although Berwick eventually agreed to grant the exemption upon remand by the court of common pleas, its attempted coercive use of the ordinance cannot be ignored. If Berwick had succeeded in obtaining Hollywood's consent to the settlement terms, Hollywood would have waived its ability to challenge thereafter the constitutionality of the ordinance and would have been bound by its provisions. Berwick then would have achieved compli-

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ance with the ordinance without actually having to utilize its provisions.⁷

Berwick's inclusion of the reference to the ordinance in its settlement proposal to Hollywood and its alleged refusal to grant an exemption based on Hollywood's distribution of adult movies could support a finding that Berwick sought to use the ordinance in a coercive manner. In our opinion, this provides sufficient justification for Hollywood to have a reasonable expectation of enforcement of the ordinance against it prospectively. The ordinance is still on the books and capable of utilization, and just because it has not yet been formally utilized by Berwick does not preclude its future use. Indeed, Berwick's raising of the ordinance in the settlement agreement suggests it views Hollywood's business as subject to the ordinance. Therefore, unless subsequent events have rendered enforcement against Hollywood substantially less likely, we are satisfied that Hollywood has a sufficient justification for fearing enforcement of the ordinance against it such that a ripe controversy exists allowing Hollywood to challenge the constitutionality of the statute.

⁷ The indirect use of Ordinance 1158 may be as effective as an action brought directly under its provisions. The Supreme Court has recognized that such indirect methods can be successful, even in the face of an unconstitutional statute:

It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession and sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of the publications deemed "objectionable" and succeeded in its aim.

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B.

Hollywood also argues that in addition to its challenge to the ordinance, it stated a viable cause of action on other grounds which would constitute a case or controversy, but which were not addressed by the court below. Based on our review of the record, we agree that there were sufficient allegations of past deprivations of constitutional rights and damages flowing therefrom, such that a live case or controversy exists.

Hollywood alleged that the Board denied its application for a special zoning exemption based on an improper reason—the fact that Hollywood as part of its business rented and sold x-rated movies—which deprived Hollywood of its right to free expression and due process. Specifically, Hollywood's complaint stated, in paragraph 12:

The Plaintiffs' application met all requirements of the law of the Commonwealth of Pennsylvania and of the Zoning Ordinance of the Borough of Berwick and the application was denied because a portion of the videotape rentals involved x-rated movies.

App. at 8. In its order dismissing the action, the district court failed to address any of Hollywood's causes of action other than its challenge to Ordinance 1158. Based on the allegations in paragraph 12, as well as the types of constitutional violations alleged in the damages section of the complaint, we discern two separate and viable causes of action which create a case or controversy.

First, we believe that Hollywood alleged a viable due process violation. As the Supreme Court has stated, the due process clause of the fourteenth amendment protects against arbitrary or irrational government action. *Daniels*

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v. Williams, 474 U.S. 327, 331 (1986); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), including zoning decisions. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). In this case, Hollywood alleged that the exemption was denied for no reason other than that it possessed a certain type of movie for rent or resale. In our opinion, this allegation, although inartfully drawn, plainly states a cause of action based on a violation of due process, since a denial based on nothing other than the subject matter of the films it distributed would be arbitrary or irrational. Therefore, if Hollywood can successfully demonstrate that the defendants arbitrarily or irrationally denied the exemption, visiting a constitutional deprivation on it, then Hollywood may prevail on its due process claim. See, e.g., *Bello v. Walker*, No. 87-3504 (3d Cir. February , 1988)

Second, we believe that Hollywood has also stated a cause of action for a violation of its right of free expression under the first amendment. As the first amendment embraces the production, distribution and exhibition of films and other forms of entertainment, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), this protection is afforded to Hollywood's distribution of home videos. According to Hollywood the denial of the zoning exemption was based solely on the fact that some of Hollywood's movies were x-rated. Thus, the denial can be viewed as an attempt by the Board members to regulate Hollywood's distribution on the basis of subject matter alone. The first amendment prevents the government from regulating expression "because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Therefore, if as alleged the denial was

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based on the subject matter of twenty percent of Hollywood's business, the denial was improper—an unconstitutionally broad stroke, effectively preventing the dissemination of these films without adherence to constitutionally mandated procedures and safeguards.⁸

⁸ The Board members through their denial may have sought to prevent the distribution of obscene materials or further some other important governmental interest. Indeed, it is well settled that obscene speech is not protected. *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957), and that even protected speech, including films, may be subject to reasonable time, place and manner restrictions where significant governmental interests are served, so long as the regulation is reasonable and is not based on content or subject matter. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). However, if a restriction based on obscenity is to be imposed, it must be preceded by an examination of the content of that material. *Young v. American Mini Theatres*, 427 U.S. 50, 69-70 (1976). In this case, the record supports the assertion that the decision to deny the exemption was made on the basis of the subject matter of the films; there was no review of the content of the films to determine whether they were obscene and therefore not subject to protection. In fact, the Board articulated no official reason or finding concerning the denial.

If the restriction is to be made based on an important governmental interest, that interest should have been articulated, and the restriction should not have been based on the subject matter of the speech, nor should the exclusion have been total. Indeed, the total suppression of the speech by reason of the zoning denial causes another possible constitutional infirmity because, as the Supreme Court cautioned, where restrictions are placed on unprotected expression, the restrictions must be drawn such that they do not unnecessarily infringe on lawful speech. *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961). The denial here had just that effect—restricting access to undoubtedly protected speech. The denial might also be characterized as a prior restraint, since it worked to proscribe Hollywood's ability to distribute any films. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

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We conclude, then, that Hollywood has stated a cause of action for violations of its due process and free expression rights under section 1983,⁹ and that its claim for damages flowing therefrom demonstrates that a live case or controversy exists. It does not matter that the Board has since reversed itself and granted the zoning exemption; if Hollywood's allegations are true and the denial deprived Hollywood of any constitutional right, even temporarily, the denial would be compensable (the damages flowing therefrom would cover the period running from the denial through the time the exemption was finally granted and Hollywood was allowed to open). Since a viable claim for damages insures that a live controversy exists, *Powell v. McCormick*, 395 U.S. 486, 496-97 (1969); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459 (1957); *Gibson v. DuPree*, 664 F.2d 175, 177 (8th Cir. 1981) (per curiam); 13A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §3533.3, at 261-62 (1984), and we find that Hollywood has set forth a claim for damages, we conclude that Hollywood has adequately set forth a case or controversy.

IV.

We believe that Berwick's attempt to indirectly compel compliance with Ordinance 1158 provided a sufficient basis for Hollywood's fearing future application of the ordinance, allowing Hollywood to challenge its constitutionality. In addition, despite the fact that Hollywood has been

⁹ We are not passing on the substantive merits of Hollywood's claims, and therefore do not address whether either the ordinance or Berwick's actions violated Hollywood's constitutional rights. We conclude only that a cause of action encompassing a live case or controversy has been sufficiently stated to allow this matter to proceed further.

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granted an exemption allowing it to operate a video store in the Borough of Berwick, our review of Hollywood's complaint leads us to conclude that it states a justiciable cause of action for past constitutional deprivations and damages flowing therefrom, such that a live controversy still exists. We will reverse the district court's dismissal for lack of jurisdiction and remand for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

U.S. District Court Opinion and Order

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GLEN M. NEIDERHISER, et al.,

Plaintiffs

vs.

THE BOROUGH OF BERWICK, et al.

Defendants

Civil No. 86-1651

(Judge Muir)

FILED

Williamsport, Pa.

Jun 24 1987

DONALD R. BERRY, Clerk

PER s/ bp

Deputy Clerk

ORDER

June 24, 1987

THE BACKGROUND OF THIS ORDER IS AS FOL-
LOWS:

This case is currently on our July, 1987, trial list. The Plaintiffs filed a motion for summary judgment on April 15, 1987. The motion has been fully briefed and became ripe on June 8, 1987.

The gravamen of Plaintiffs' complaint is that they had been denied a variance to construct a video rental store because the store was a non-conforming use. The Plaintiffs assert that one of the reasons that the permit was denied was that the store would rent adult films. The zoning issue

U.S. District Court Opinion and Order

has recently been decided in Plaintiffs' favor. Nevertheless, the Plaintiffs state ". . . even if the zoning permit were issued, the Defendant Borough of Berwick intends to take the position that the Borough of Berwick Ordinance No. 1158 applies to Hollywood Video, since the Plaintiff intends to open a store somewhere in the Borough." Ordinance No. 1158 prohibits the viewing and sale of pornography. It imposes civil penalties upon violators. The Plaintiffs request that this Court declare the Borough of Berwick Ordinance No. 1158 null and void as impermissibly vague and a prior restraint upon free expression. Before we may act we must determine whether or not we have jurisdiction. —

In order for a federal court to have jurisdiction, there must be a live case or controversy. U.S. Const. Art. III §2. In determining whether Plaintiffs have asserted a case or controversy within the meaning of the Constitution we must ascertain whether there is a definite and concrete dispute between the parties rather than a hypothetical or abstract dispute. *See City of Los Angeles vs. Lyons*, 461 U.S. 95 (1983); *Railway Mail Ass'n. vs. Corsi*, 326 U.S. 88 (1945); *Brown vs. Pornography Comm.*, 620 F.Supp. 1199, 1206 (E.D. Pa. 1985). Plaintiffs who challenge an ordinance must demonstrate a realistic danger of sustaining a direct injury as a result of its enforcement of that ordinance. *Id.* The Plaintiffs, however, do not have to await the consummation of threatened injury to obtain relief. It is enough that injury is impending with certainty. *Pennsylvania vs. West Virginia*, 262 U.S. 553, 593 (1923). Nonetheless, Plaintiffs who have no more than an imaginary or speculative belief that they will be prosecuted or who have not been threatened with prosecution do not al-

U.S. District Court Opinion and Order

lege a controversy susceptible to resolution by a United States District Court. *Younger vs. Harris*, 401 U.S. 37, 42 (1971).

Plaintiffs' complaint in ¶ 14 and their statements of material facts not in issue in ¶ 4 state that they believe the Borough of Berwick will enforce ordinance 1158 against them in futuro. They do not assert that the Borough has ever threatened them regarding violations of the ordinance. It is Defendants' position that Borough Ordinance 1158 is enforced against everyone and that the Plaintiffs have not been specifically threatened with any prosecution under that ordinance. Defendants argue that the Plaintiffs' claim that ordinance 1158 will be used against them is imaginary and speculative. Plaintiffs argue that the very fact that they, like all other persons in the Borough of Berwick, are subject to ordinance No. 1158 deprives them of their free speech and due process rights and that this, alone, presents a realistic danger of sustaining a direct injury as a result of the operation or enforcement of the ordinance. Plaintiffs further contend that actual enforcement of the ordinance through seizure of films or closing down of the store would injure Plaintiffs directly.

This is an insufficient argument to present a case in controversy. We are prohibited from issuing declaratory or advisory opinions. This case does not fall under the narrow line of cases such as *Roe vs. Wade* which recognize an exception to the case or controversy rule for matters which will evade review by being rendered moot if not heard by a federal court. Additionally, the Borough of Berwick ordinance provides for civil penalties, not criminal penalties, and therefore, is not to be stringently reviewed as those laws imposing criminal penalties. *Cf. Steffel vs. Thompson*, 415 U.S. 452, 459 (1974).

20a

U.S. District Court Opinion and Order

We shall not grant summary judgment because in order to do so we would have to find that there are no material facts in issue and the movants are entitled to a judgment as a matter of law. Instead, we are of the view that this case must be dismissed for want of jurisdiction.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' motion for summary judgment filed April 15, 1987 is denied.
2. This case is dismissed for want of jurisdiction.
3. The Clerk of Court shall close the file in this case.

s/ Muir

MUIR, U.S. District Judge

MM:bd

U.S. District Court Opinion and Order

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GLEN M. NEIDERHISER, et al.,

Plaintiffs

vs.

THE BOROUGH OF BERWICK, et al.,

Defendants

Civil No. 86-1651

Complaint Filed 11/20/86

(Judge Muir)

FILED

Williamsport, Pa.

Dec 7 1987

DONALD R. BERRY, Clerk

PER s/ se

Deputy Clerk

ORDER

December 7, 1987

THE BACKGROUND OF THIS ORDER IS AS FOL-
LWS:

By order of June 24, 1987, this Court dismissed this case for want of jurisdiction because of the lack of a case or controversy. On July 23, 1987, the Plaintiffs filed a "Motion For Relief From Judgment Or Order Pursuant To Fed.R.Civ.P. 60." On July 24, 1987, the Plaintiffs appealed from our order of June 24, 1987, to the Court of Appeals for the Third Circuit. On September 28, 1987, this Court ordered the Plaintiffs to file a brief addressing whether this

U.S. District Court Opinion and Order

Court had been divested of jurisdiction to rule on the Plaintiffs' Motion For Relief From Judgment Or Order By Reason Of Their Appeal To The Court of Appeals for the Third Circuit. On October 13, 1987, the Plaintiffs filed a "Brief Relating to Jurisdictional Issue Generated by Motion for Relief from Judgment or Order." On October 30, 1987, the Defendants filed a responsive brief. No reply brief has been filed and the time within which to do so expired on November 16, 1987. Local Rule 401.7.

The Plaintiffs filed their motion for relief from judgment or order pursuant to Fed.R.Civ.P. 60(b)(1) and 60(b)(6) which state as follows:

On motion and upon such terms as are just, the Court may relieve a party or a party's legal representatives from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment.

As a general rule, the filing of a notice of appeal confers jurisdiction on a Court of Appeals and divests the district court of jurisdiction over those aspects of the case involved in the appeal. *Venen vs. Sweet*, 758 F.2d 117, 120 (1985) citing *Griggs vs. Provident Consumer Discount Company*, 459 U.S. 56, 58 (1982) and *United States vs. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980). Nevertheless, the District Court retains the power to act in a limited number of circumstances. A district court has the power to entertain and to *deny* a Rule 60(b) motion while an appeal is pending; however, if the District Court is inclined to *grant* a rule 60(b) motion, it must certify its inclination to do so to the Court of Appeals which can then entertain a motion to

U.S. District Court Opinion and Order

remand the case. *Venen vs. Sweet*, 758 F.2d 117 (1985). If the case is subsequently remanded, the District Court will have power to grant the motion, but not before. *Id.* (citations omitted). Because we will deny the Plaintiffs' Rule 60(b) motion, we have the power to act on it.

In their motion, the Plaintiffs argue that this Court made an error when we dismissed their entire case for lack of jurisdiction *sua sponte* after they had filed a motion for summary judgment limited exclusively to the first count of the complaint. We have reviewed our order of June 24, 1987. There was no mistake or inadvertance in our decision *sua sponte* to dismiss the Plaintiffs' case for want of jurisdiction on the ground that they had presented no case or controversy for decision. Whether or not our dismissal was proper is now before the Court of Appeals. We shall await their decision.

NOW, THEREFORE, IT IS ORDERED THAT:

Plaintiffs' motion for relief from judgment or order pursuant to Fed.R.Civ.P. 60(b) is denied.

s/ Muir

MUIR, U.S. District Judge

MM:tb

Court of Common Pleas Order

IN THE COURT OF COMMON PLEAS
OF THE 26TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COLUMBIA COUNTY BRANCH
CIVIL ACTION—LAW
GLEN M. NEIDERHISER AND
GREGORY C. BROWN, t/a
PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO,
APPELLANT
V.
THE ZONING HEARING BOARD OF
THE BOROUGH OF BERWICK,
APPELLEES.

NO. 906—1986

JOHN A. MIHALIK, ESQUIRE, Attorney for Appellant
JOSEPH F. TORSELLA, ESQUIRE, Attorney for
Appellees

ORDER OF COURT

AND NOW, to wit, this 22nd day of April, 1987, we remand this case to the Zoning Hearing Board of the Borough of Berwick to hold a hearing to develop the record in accordance with this Opinion.

Hearing shall be held within thirty days of the date of this Order, with Findings of Fact and Conclusions of Law to be filed with the Court within thirty (30) days following hearing.

BY THE COURT:
s/ Jay W. Myers P.J.

Court of Common Pleas Opinion

IN THE COURT OF COMMON PLEAS
OF THE 26TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COLUMBIA COUNTY BRANCH
CIVIL ACTION—LAW

GLEN M. NEIDERHISER AND
GREGORY C. BROWN, t/a
PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO,
APPELLANT

V.

THE ZONING HEARING BOARD OF
THE BOROUGH OF BERWICK,
APPELLEES.

NO. 906—1986

JOHN A. MIHALIK, ESQUIRE, Attorney for Appellant

JOSEPH F. TORSELLA, ESQUIRE, Attorney for
Appellees

OPINION

This matter is before us on Appeal from a decision of the Zoning Hearing Board of the Borough of Berwick ("Board"), Appellees, which denied an application for a special exception to Appellants, Glen M. Neiderhiser and Gregory C. Brown, t/a Progressive Enterprises, and Hollywood Stereo and Video.

The premises in question is located at 906 Market Street, Berwick, Columbia County, Pennsylvania. The subject property has been utilized for commercial pur-

Court of Common Pleas Opinion

poses for some thirty (30) years, most recently as a pizza parlor. The Appellants in their application did not request any dimensional changes in the non-conforming use.

Following hearing the Board submitted two (2) findings of fact which pertained to Zoning Ordinance Sections 165-118 (1) through (8), and 165-168 (1) through (7). The Board concluded that no commercial sales would be permitted to be carried out on the subject property in denying the application.

The aforesaid Zoning Ordinance sections are set forth below:

Section 165-11;

B. The following special exception uses are permitted, subject to the issuance of a permit by the Zoning Hearing Board as provided for in Section 165-95 of this chapter:

(1) Private nursery, elementary and high schools and institutions of higher education; provided, however, that the lot upon which use is located contains a minimum of one (1) acre plus five hundred (500) square feet of land area per pupil.

(2) Professional offices and home occupations, provided that there is no external evidence of such use except an announcement sign not over two (2) square feet in area, that not more than fifty (50%) of the total floor area is used for such purposes and that not more than two (2) persons other than members of the immediate family are employed.

(3) Recreational areas, not including swimming pools, and structures operated by membership clubs

Court of Common Pleas Opinion

for the benefit of their members and not for gain, provided that the residential character of the neighborhood is preserved so as to in no way give the impression of a commercial use.

(4) Golf courses and country clubs.

(5) Cemeteries.

(6) Planned residential developments. (See Article XV).

(7) Necessary public utility structures and buildings, provided that they do not include materials storage, storage for trucks, repair facilities or housing quarters for the repair crews.

(8) Private swimming pools as an accessory use to a dwelling. (See Section 165-76).

Section 165-16:

B. The following special exception uses are permitted upon the issuance of a permit by the Zoning Hearing Board as provided in Section 165-95 of this chapter:

(1) Special exceptions as specified in the R-1 Districts.

(2) Conversion apartment dwellings, subject to the limitations of minimum lot and habitable floor requirements in Section 165-73 of this chapter.

(3) Hospitals, clinics and nursing homes, provided that care of drug addicts, chronic alcoholics or persons suffering from insanity or from diseases requiring isolation is not included.

Court of Common Pleas Opinion

(4) Professional offices and home occupations, subject to the regulations prescribed in the R-1 Residential Districts.

(5) Mobile home parks and subdivisions, as provided for in Section 165-74 of this chapter.

(6) Funeral homes.

(7) Rooming houses and tourist homes.

Appellants argue that the Board also erred in not granting their request under Zoning Ordinance Section 165-85A which is set forth below:

Section 165-85 Alterations:

A. Upon application for a special exception, the Zoning Hearing Board *may* approve the expansion or alteration of a use of land or buildings which is not in conformance with the provisions of this chapter, provided that such expansion or alteration of use is restricted to an additional area not exceeding thirty-five percent (35%) of those existing buildings, structures, parcels, lots or tracts of land devoted to the nonconforming use and existing on the effective date of this chapter or any amendment thereto creating the nonconformity. However, such approved expansion or alteration of a nonconforming use shall not create new dimensional nonconformities or further increase existing dimensional nonconformities except upon the approval of a variance by the Zoning Hearing Board. (emphasis ours)

On the other hand the Board contends that it was not required to grant Appellants' application under Section

Court of Common Pleas Opinion

165-85A because the language of the Ordinance, "may", is permissive and not mandatory.

"Permissive" implies a use of discretion. We note that there is no testimony or evidence in the record of the Board's hearing to enable us to ascertain the Board's reasons, within its discretion, for denying the application as it relates to the above Zoning Ordinance Section 165-85A. While the record is replete with generalized opinions and philosophical expressions we require a clear-cut explanation of the basis of the Board's decision.

We would also note that the Board was made aware of Zoning Ordinance Section 165-85A by the Code Officer, who testified at page 5, ". . . I am the one that advised him (i.e. the Appellant) that according to Section 165-85A you (Board) can in fact grant Special Exception for a change of use (under that section) and that is why he is here." However, the Board did not expand upon that issue raised by the Code Officer.

Therefore, we must remand the matter to the Zoning Hearing Board to hold a hearing to develop the record on the issues relative to Zoning Ordinance Section 165-85A. Specifically the record must detail Findings of Fact and Conclusions of Law to support the Board's decision concerning Appellants' application under all of the applicable Sections of the Zoning Ordinance.

Zoning Hearing Board Decisions

RECEIVED

AUG 27, 1986

BOROUGH OF BERWICK

ZONING HEARINGS

AUGUST 7, 1986

7:00 P.M.

CASE NO. 1—HOLLYWOOD VIDEO & STEREO
PREPARED BY: Lisa Marie Orlando

HERMAN DAVIDSON: Mr. Chairman, I have a question with an interpretation of one of our Ordinances here. Maybe you can straighten me out on it. It is on 100-95 B 3. This is the application of extent of use regulations. If I interpret this paragraph correctly, it states that we are limited to what is listed under permitted and special uses. If my interpretation is correct, if you agree that this interpretation is correct, then I would make some findings of fact.

CARMEN BUTER: Make your findings of fact.

HERMAN DAVIDSON: Motion for finding of fact that under Paragraph 100-11 B subparagraphs (1) through (8), that no where within these paragraphs is there any indication that any sort of commercial sales can be allowed under this Special Exception.

CARMEN BUTERA: Motion on the floor. Do I hear a second. I will second that.

Questions?

All in favor signify by saying Aye: Herman Davidson, Tom Metz, Carmen Butera

Obstained: Dan DeFinnis.

Zoning Hearing Board Decisions

HERMAN DAVIDSON: Make a motion for finding of fact under Paragraph 100-16 B (1) through (7) and within the subparagraph there are no indications of an allowance of a commercial business or movie-type business allowed within this area.

CARMEN BUTERA: SECOND? I'll second that.

Questions?

All in favor signify by saying aye: Herman Davidson, Tom Metz, Carmen Butera

DAN DEFINNIS: Abstained.

HERMAN DAVIDSON: Motion that we deny the application of Hollywood Video and Stereo for their Special Permit at 906 Market Street.

CARMEN BUTERA: Second.

Questions?

All in favor signify by saying Aye. Herman Davidson, Tom Metz, Carmen Butera, Dan DeFinnis.

CARMEN BUTERA: Mr. Brown, Our Codes Officer will be sending you a letter indicating that your application has been denied.

HOLLYWOOD VIDEO ZONING APPEAL FINDING OF FACTS

1. The property situate at 906 Market Street, consisting of an area 28 feet x 35 feet, attached to convenience store, self-service gas station is a preexisting nonconforming structure used for commercial purposes prior to adoption of the Zoning Ordinance and continuing to date of hearing, without abandonment, even though there was some periods of vacancy between changes of use to August of 1986.

2. The property which is the subject of this application does not propose any increase utilization of area and does not create any additional dimensional nonconformities.

3. The continued use of the 28 feet x 35 feet structure with off street parking along the South side in an area 75 feet x 200 feet, will not restrict or prevent orderly and appropriate development of the zone and have no affect upon either existing or future streets giving access to the property.

4. The proposed operation, as restricted in testimony of the applicant, will not adversely affect the development of the zone as the zone is completely developed.

5. There exists adequate water, sewage, storm drainage, fire and police protection to service the property.

6. The proposed use will not create any traffic congestion, nor will the use cause independent commercial use of the residential streets, as this use is already present-

Zoning Hearing Board Decisions

ed and results from location of adjacent industrial complex to the West.

7. The proposed use will not damage or adversely affect the value of adjacent properties which are commercial to the North, commercial to the West, mixed commercial and manufacturing to the East, residential to the South and those buildings which are immediately adjacent to the proposed structure.

8. The application does not include adequate provisions for construction and operation of two (2) signs which are illuminated.

CONCLUSIONS OF LAW

1. As a result of finding that the proposed structure is a preexisting nonconforming structure, the application for change of use is governed by Sections 165-85 and 165-95, not 165-16 and 165-11. The failure to list this type of use in Section 165-16 and 165-11 does not prevent the granting of application for change of one nonconforming use to another nonconforming use.

2. The application meets the requirements of 165-95 B (4) in that the proposed use will not affect the harmony or orderly and appropriate development, as the zone is fully developed, the location has no affect upon existing or future streets, the nature and the intensity of the operation is not an issue, the property has all of the facilities and services required, and finally, the use will not create traffic congension or cause commercial or industrial to use residential streets, as this use already exists due to the location of industrial zone beginning at the Southwest corner of Tenth and Market Streets and extending North along an

Zoning Hearing Board Decisions

alley 175 feet West of Market Street to Fourteenth Street and Westwardly to Vine Street.

3. Applicant shall be authorized to conduct video tape rental and retail sales of video tapes and video equipment on the premises specified, 28 feet x 35 feet, without the operation of coin video arcade and pursuant to the requirements of 165-72 (5), Signs, and 165-71, Off street Parking.

ZONING HEARING BOARD OF
THE BOROUGH
OF BERWICK.

s/ Carmen Butera

CARMEN BUTERA CHAIRMAN

s/ John Lipovsky

JOHN LIPOVSKY, MEMBER

s/ Thomas G. Metz

THOMAS METZ, MEMBER (Absent at first rehearing, present at hearing on Findings of Fact and Conclusions of Law.)

s/ Herman S. Davidson

HERMAN DAVIDSON, MEMBER.
(Voting "no" on Finding of Fact One (1) and Two (2). "Abstaining" from vote on Findings of Fact Three (3) through Eight (8) and Conclusions.)

DATED: May 13, 1987

Borough of Berwick Zoning Ordinance

ZONING

Chapter 100

From the

CODE

of the

BOROUGH OF BERWICK

COUNTY OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA

[Printed as adopted 1-19-76 as Ord. No. 1098. Consult municipal records for possible amendments adopted thereafter.]

GENERAL CODE PUBLISHERS CORP.

Spencerport, New York 14559

1977

ARTICLE I

Short Title; Purpose; Objectives

§100-1. Short title.

This ordinance shall be known as the "Berwick Borough Zoning Ordinance."

§100-2. Purpose.

The fundamental purpose of this ordinance is to promote the safety, health, morals, convenience and general welfare, to encourage the most appropriate use of land throughout the borough, to conserve and stabilize the val-

Borough of Berwick Zoning Ordinance

ue of property to prevent overcrowding of land and buildings, to avoid undue concentration of population, to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to provide adequate open spaces for light and air, to facilitate adequate provision of streets and highways, water, sewerage, drainage and other public facilities, to conserve life, property and natural resources and to conserve the expenditure of funds earmarked for public improvements.

§100-3. Community development objectives.

This Zoning Ordinance is to render a legal basis and framework to the future land use plan established as a result of the planning studies undertaken by the Berwick Borough Planning Commission. In order to properly guide future growth, improve existing development and enable the most economical provision of municipal services within the Borough of Berwick, the following development goals are hereby established:

A. To eliminate hazardous and detrimental land uses while encouraging beneficial and compatible uses.

B. To maintain a desirable residential environment with adequate recreational, commercial and industrial supporting areas.

C. To protect and conserve open spaces.

D. In general, to avoid the problems inherent in random and inconsistent development.

Borough of Berwick Zoning Ordinance

§100-11. Permitted and special exception uses.

A. The following uses are permitted in the R-1 Residential Districts:

- (1) Single-family detached dwelling units.
- (2) Public nursery, kindergarten, elementary and high schools.
- (3) Churches and similar places of religious worship.
- (4) Public parks, playgrounds and open space.
- (5) General gardening and the growing of trees and nursery stock, not including roadside displays or commercial signs.
- (6) Customary accessory uses and buildings incidental to any permitted uses, including:
 - (a) Private garages.
 - (b) Garden houses, toolhouses, playhouses or greenhouses not used for commercial purposes.
 - (c) Signs, as provided for in §100-72 of this ordinance.

B. The following special exception uses are permitted, subject to the issuance of a permit by the Zoning Hearing Board as provided for in §100-95 of this ordinance.

- (1) Private nursery, elementary and high schools and institutions of higher education; provided, however, that the lot upon which it is located contains a minimum of one (1) acre plus five hundred (500) square feet of land area per pupil.

Borough of Berwick Zoning Ordinance

(2) Professional offices and home occupations, provided that there is no external evidence of such use except an announcement sign not over two (2) square feet in area, that not more than fifty percent (50%) of the total floor area is used for such purposes and that not more than two (2) persons other than members of the immediate family are employed.

(3) Recreational areas, not including swimming pools, and structures operated by membership clubs for the benefit of their members and not for gain, provided that the residential character of the neighborhood is preserved so as to in no way give the impression of a commercial use.

(4) Golf courses and country clubs.

(5) Cemeteries.

(6) Planned residential developments. (See Article XV.)

(7) Necessary public utility structures and buildings, provided that they do not include materials storage, storage for trucks, repair facilities or housing quarters for repair crews.

(8) Private swimming pools as an accessory use to a dwelling. (See §100-76.)

§100-16. Permitted and special exception uses.

A. The following uses are permitted in the R-2 Residential Districts:

(1) Uses permitted in the R-1 Residential Districts, subject to the regulations of the R-1 Residential Districts.

Borough of Berwick Zoning Ordinance

(2) Two-family attached or semidetached dwellings.

(3) Customary accessory uses and buildings incidental to any of the above permitted uses, including those specified in the R-1 Residential Districts.

B. The following special exception uses are permitted, upon the issuance of a permit by the Zoning Hearing Board as provided in §100-95 of this ordinance:

(1) Special exceptions as specified in the R-1 Districts.

(2) Conversion apartment dwellings, subject to the limitations of minimum lot and habitable floor requirements in §100-73 of this ordinance.

(3) Hospitals, clinics and nursing homes, provided that care of drug addicts, chronic alcoholics or persons suffering from insanity or from diseases requiring isolation are not included.

(4) Professional offices and home occupations, subject to the regulations prescribed in the R-1 Residential Districts.

(5) Mobile home parks and subdivisions as provided for in §100-74 of this ordinance.

(6) Funeral homes.

(7) Rooming houses and tourist homes.

Borough of Berwick Zoning Ordinance

ARTICLE XVI

Nonconforming Buildings and Uses**§100-81. Continuance.**

Except as otherwise provided in this Article, the lawful use of land or buildings existing at the date of the adoption of this ordinance may be continued, although such use or building does not conform to the regulations specified by this ordinance for the zone in which such land or building is located; provided, however, that no nonconforming lot shall be further reduced in size.

§100-82. Cessation of use.

A nonconforming use shall be adjudged as terminated when there occurs a cessation of any such use or activity by an apparent act or failure to act on the part of the tenant or owner to reinstate such use within a period of one (1) year from the date of cessation or discontinuance. Such use shall not thereafter be reinstated, and the structure shall not be reoccupied except in conformance with this ordinance.

§100-83. Restoration of buildings.

If any nonconforming building shall be destroyed by reason of windstorm, fire, explosion or other act of God or the public enemy to an extent of more than fifty percent (50%) of the building, then such destruction shall be deemed complete destruction and the structure may not be rebuilt, restored or repaired except in conformity with the regulations of this ordinance. Nothing in this ordinance shall prevent the strengthening or restoring to a safe condi-

Borough of Berwick Zoning Ordinance

tion any wall, floor or roof which has been declared unsafe by the Building Inspector.

§100-84. Revision.

No nonconforming use shall, if once changed into a conforming use, be changed back again into a nonconforming use.

§100-85. Alterations.

A. Upon application for a special exception, the Zoning Hearing Board may approve the expansion or alteration of a use of land or buildings which is not in conformance with the provisions of this ordinance, provided that such expansion or alteration of use is restricted to an additional area not exceeding thirty-five percent (35%) of those existing buildings, structures, parcels, lots or tracts of land devoted to the nonconforming use and existing on the effective date of this ordinance or any amendment thereto creating the nonconformity. However, such approved expansion or alteration of a nonconforming use shall not create new dimensional nonconformities or further increase existing dimensional nonconformities except upon the approval of a variance by the Zoning Hearing Board.

B. A dimensional nonconformity may be altered or expanded only if such alteration or expansion is in conformance with the provisions of this ordinance; however, upon issuance of a special exception, additions or improvements may be made, provided that such additions or improvements do not create new dimensional nonconformities or further increase existing dimensional nonconformities.

*Borough of Berwick Zoning Ordinance***§100-86. Construction approved prior to ordinance.**

Nothing herein contained shall require any changes in plans, construction or designated use of a building for which a building permit has been heretofore issued and the construction of which shall have been diligently prosecuted within three (3) months of the date of such permit and ground story framework of which, including the second tier of beams, shall have been completed within six (6) months of the date of the permit and which entire building shall be completed according to such plans as filed within one (1) year from the date of this ordinance.

§100-87. Change of district boundaries.

Whenever the boundaries of a district shall be changed so as to transfer an area from one district to another district of a different classification, the foregoing provisions shall also apply to any nonconforming uses existing therein or created thereby.

§100-88. Discontinued nonconforming use of open land.

All nonconforming signs, billboards, junk storage areas, storage areas and similar nonconforming uses of open land not involving a substantial investment in permanent buildings, when discontinued for a period of six (6) months or damaged to an extent of fifty percent (50%) or more of replacement costs, shall not be continued, repaired or reconstructed.

*Borough of Berwick Zoning Ordinance***ARTICLE XVII
Enforcement and Administration****§100-89. Enforcement by Zoning Officer.**

The provisions of this ordinance shall be administered and enforced by a Zoning Officer, appointed by the Borough Council, who shall have the power to administer the Zoning Ordinance in accordance with its literal terms, as well as the power to make inspection of buildings or premises necessary to carry out his duties in the enforcement of this ordinance.

§100-90. Permits and certificates.

A. Zoning permits. Zoning permits shall hereafter be secured from the Zoning Officer's office prior to the issuance of a building permit for the construction, erection or alteration of a structure or sign or part of a structure or upon a change in the use of a structure or land. The fee for said permit shall be included in the building permit fee.

B. Building permits.

(1) For the construction, alteration, demolition or relocation of any structure, a building permit must be obtained from the Zoning Officer. A building permit shall become void in ninety (90) days from the date of issuance unless actual construction has begun by that date on the project described therein.

(2) The permit application must be accompanied by a site plan, in duplicate, showing as necessary to demonstrate conformity to this ordinance.

(a) Lot: the location and dimensions of the lot.

Borough of Berwick Zoning Ordinance

(b) Streets: names and widths of abutting streets and highways.

(c) Structures and yards: locations, dimensions and uses of existing and proposed structures and yards on the lot and, as practical, of any existing structures within one hundred (100) feet of the proposed structure but off the lot.

(d) Improvements: proposed off-street parking and loading areas and access drives, with walks. Proposed sewage disposal system.

(e) Orientation: the North direction must be shown.

(3) A site plan is not required for projects which are concerned only with maintenance of or repair to existing structures.

C. Special exceptions.

(1) For any use not permitted, special exception must be obtained from the Zoning Hearing Board. In addition to the information required on the building permit application, the special exception application must show:

(a) Ground floor plans and elevations of proposed structures.

(b) Names and addresses of adjoining owners.

(2) Unless otherwise specified or extended by the Zoning Hearing Board, a special exception authorized by the Board expires if the applicant fails to obtain, where required to do so, a building permit

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within six (6) months of the date of the authorization of the special exception.

D. Temporary use permits. It is recognized that it may be in accordance with the purpose of this ordinance to permit temporary activities for a limited period of time, which activities may be prohibited by other provisions of this ordinance. If such uses are of such a nature and are so located that, at the time of petition, they will in no way exert a detrimental effect upon the uses of land and activities normally permitted in the zone or will contribute materially to the welfare of the borough, particularly in a state of emergency, under conditions peculiar to the time and place involved, then the Zoning Hearing Board may, subject to all regulations for the issuance of special exception elsewhere specified, direct the Zoning Officer to issue a permit for a period not to exceed six (6) months. Such permit may be extended not more than once for an additional period of six (6) months.

E. Certificate of occupancy. It shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, located, erected, changed, converted or enlarged wholly or partly until a certificate of occupancy has been issued for that premises, certifying that the structure or use complies with the provisions of this ordinance. Such occupancy permits shall be granted or denied within fifteen (15) days from the date that a written application is filed with the Zoning Officer. In the event that the issuance of a certificate of occupancy is denied upon application therefor, the Zoning Officer shall notify the Zoning Hearing Board, in writing, of his action and the specific reasons therefor.

*Borough of Berwick Zoning Ordinance***§100-91. Variances.**

A. Filing of variance application. An application may be made to the Zoning Hearing Board for a variance where it is alleged that the provisions of this ordinance inflict unnecessary hardship upon the applicant. The application must be on a form provided for that purpose by the Zoning Officer. It must be filed with the Board and copies given to the Zoning Officer and Borough Planning Commission. The applicant must provide all the information and data that may be required to advise the Board on the variance, whether such information is called for on the official form or not.

B. Expiration. Unless otherwise specified or extended by the Board, a variance authorized by it expires if the applicant fails to obtain a building permit or use certificate within six (6) months from the date of authorization of the variance.

§100-92. Appeals.

Any person aggrieved or affected by any provision of this ordinance or decision of the Zoning Officer may appeal in the manner set forth in Article X of the Pennsylvania Municipalities Planning Code, Act 247, as amended.⁴

§100-93. Fees; penalties; remedies.

A. Fees. The Borough Council shall set fees, payable in advance, for all applications, permits or appeals provided for by this ordinance to defray the costs of advertising, processing, inspecting, mailing

⁴ Editor's Note: See 53 P.S. §11001 et seq.

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notices, charges of a stenographer for taking the notes of testimony, and copying applications, permits and occupancy certificates.⁵ Building permit fees shall not be required for any maintenance operations, such as painting, roof repair, window replacement, installation of siding, replacement of defective structural members or similar maintenance measures.

B. Penalties.

(1) Any person, partnership or corporation who violates the provisions of this ordinance is subject to the penalties following:

(a) A fine of not less than fifty dollars (\$50.) and not more than five hundred dollars (\$500.).

(b) In default of payment of this fine, imprisonment for not more than sixty (60) days.

(2) A District Magistrate may impose these penalties. The imposition of one (1) penalty for any violation does not excuse the violation or permit it to continue. Each day the prohibited offense continues constitutes a separate offense.

C. Public hearings. At public hearings, the applicant as appellant is entitled to the rights set forth in §100-95 and must conform to the procedures set forth therein.

D. Enforcement remedies. In case any building, structure or land is or is proposed to be erected, constructed, reconstructed, altered, converted, maintained or used in violation of this ordinance, the Borough Council or, with the approval of the Borough

⁵ Editor's Note: See Ch. 102, Zoning Fees.

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Council, an officer of the borough, in addition to other remedies, may in the name of the borough take appropriate action or proceeding to prevent, restrain, correct or abate such building, structure or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

E. Curative amendments. A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest, may submit a curative amendment to the Borough Council with a written request that his challenge and proposed amendment be heard and decided as provided in Section 1004 of the Pennsylvania Municipalities Planning Code, Act 247, as amended.⁶

§100-94. Zoning Officer.

A. Appointment and powers. For the administration of this ordinance, a Zoning Officer, who may not hold any elective office in the borough, shall be appointed by the Borough Council. The Zoning Officer shall administer the Zoning Ordinance in accordance with its literal terms and shall not have the power to permit any construction or any use or change of use which does not conform to the Zoning Ordinance. The Zoning Officer is the enforcement officer for this ordinance. He issues all building permits, certificates of occupancy and, at the direction of the Zoning Hearing Board, special exceptions and variances. The Zoning Officer shall identify and regis-

⁶ Editor's Note: See 53 P.S. §11004.

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ter nonconforming uses and nonconforming structures.

B. Forms: The Zoning Officer must provide a form or forms prepared by the Borough Solicitor for:

- (1) Zoning permits.
- (2) Building permits.
- (3) Special exceptions.
- (4) Certificates of occupancy.
- (5) Variances.
- (6) Appeals.
- (7) Nonconforming uses and nonconforming structures.

C. Transmittal of papers. Upon receipt of an application for a special exception, variance or a notice of appeal, the Zoning Officer must transmit to the Secretary of the Zoning Hearing Board and to the Borough Planning Commission copies of all papers constituting the record upon the special exception, variance or appeal.

D. Action on building permits. Within fifteen (15) days, except for holidays, after receipt of an application for a building permit, the Zoning Officer must grant or refuse the permit. If the application conforms to the applicable requirements of the Building Permit Ordinance and this ordinance, the Zoning Officer must grant a permit. If the permit is not granted, he must state, in writing, the grounds of his refusal.

E. Action on certificates of occupancy. Within fifteen (15) days, except for holidays, after receipt of

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an application for a certificate of occupancy, the Zoning Officer must grant or refuse the certificate. In the event that the issuance of a certificate of occupancy is denied upon application therefor, the Zoning Officer must state, in writing, the grounds of his refusal.

F. Violations.

(1) Upon determining that a violation of any of the provisions of this ordinance exists, the Zoning Officer must serve notice on the person committing or permitting the same that:

(a) A complaint has been filed with the Zoning Hearing Board.

(b) The Board will hold a hearing on the complaint not more than thirty (30) days following notice.

(2) Following the hearing, he must take the action necessary to terminate the violation, including recourse to a court of record.

G. Records.

(1) The Zoning Officer must keep a record of:

(a) All applications for building permits and use certificates and all actions taken on them, together with any conditions imposed by the Zoning Hearing Board.

(b) All complaints of violations of provisions of this ordinance and the action taken on them.

(c) All plans submitted.

(d) Nonconforming uses and nonconforming structures.

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(2) All records and plans are available for public inspection.

H. Reports. The Zoning Officer shall prepare a monthly report for the Borough Council summarizing for the period since his last previous report all zoning permits issued and certificates countersigned by him and all complaints of violations and the action taken by him consequent thereon. A copy of each such report shall be filed with the office of the Chief Assessor of Columbia County at the same time it is filed with the Borough Council.

§100-95. Zoning Hearing Board.**A. General.**

(1) Membership of Board. The membership of the Board shall be three (3) residents of the borough appointed by the Borough Council. Their terms of office shall be three (3) years and shall be so fixed that the term of office of one (1) member shall expire each year. The Board shall promptly notify the Borough Council of any vacancies which occur. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members of the Board shall hold no other office in the borough, except that no more than one (1) member of the Board may also be a member of the Planning Commission.

(2) Removal of members. Any Board member may be removed for malfeasance, misfeasance or non-feasance in office or for other just cause by a majority vote of the Borough Council, taken after the member has received fifteen (15) days' advance notice of the intent to take such a vote. A public hearing shall be

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held in connection with the vote if the member shall request it in writing.

(3) Organization of Board. The Board shall elect from its own membership its officers, who shall serve annual terms as such and may succeed themselves. For the conduct of any hearing and the taking of any action, a quorum shall be not less than a majority of all the members of the Board, but where two (2) members are disqualified to act in a particular matter, the remaining members may act for the Board. The Board may appoint a hearing officer from its own membership to conduct any hearing on its behalf and the parties may waive further action by the Board as provided in this section. The Board may make, alter and rescind rules and forms for its procedure, consistent with ordinances of the borough and laws of the commonwealth. The Board shall keep full public records of its business and shall submit a report of its activities to the Borough Council once a year.

(4) Powers.

(a) The Zoning Hearing Board has the following powers:

[1] Interpretations. To interpret any provision of this ordinance including district boundaries.


[2] Special exceptions. To hear and decide special exceptions upon which the Board is required to pass under this ordinance as per §100-95B following.

[3] Appeals. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Zoning Officer in the enforcement of interpretation of this ordinance.

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[4] Variances. To authorize upon application in specific cases a variance from the terms of this ordinance as per §100-95C following.

[5] Rehearings. To grant the rehearing of a case if it appears there has been a substantial change in the facts as evidence of the case as presented at the initial hearing.

[6] Validity. The Board shall hear challenges to the validity of this Zoning Ordinance or map except as indicated in Section 1003 and Subsection (1)(b) of Section 1004 of the Pennsylvania Municipalities Planning Code, Act 257, as amended.⁷ At the conclusion of the hearing, the Board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record  appeal to the court.

[7] Unified appeals. Where the Board has jurisdiction over a zoning matter, the Board shall also hear all appeals which an applicant may elect to bring before it with respect to any borough ordinance or requirement pertaining to the same development plan or development. In any such case, the Board shall have no power to pass upon the non-zoning issues, but shall take evidence and make a record thereon as provided in §100-95D. At the conclusion of the hearing, the Board shall make findings on all relevant issues of fact which shall become part of the record on appeal to court.

⁷ Editor's Note: See 53 P.S. §§11003 and 11004(1)(b).

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(b) In exercising the powers above, the Board, in conformity with the provisions of this ordinance, may reverse, affirm or modify the order, requirement, decision or determination as ought to be made.

(5) Board calendar. Each application or appeal filed in the proper form with the required data must be numbered serially and be placed upon the calendar of the Board by the Secretary. Applications and appeals must be assigned for the hearing in the order in which they appear on the calendar. However, for good reason, the Board may order the advance of the application or appeal. The Board must fix a reasonable time for hearings.

B. Special exceptions.

(1) Referral to Planning Commission. All applications for a special exception must be referred to the Borough Planning Commission for a report.

(2) Conditions. The Zoning Hearing Board, in passing upon special exception applications, may attach conditions considered necessary to protect the public welfare and the Comprehensive Plan, including conditions which are more restrictive than those established for other uses in the same district.

(3) Application of extent-of-use regulations. The extent-of-use regulations, as set forth in the use regulations, must be followed by the Zoning Hearing Board. Where no extent-of-use regulations are set forth for the particular use, the Board must impose extent-of-use requirements as necessary to protect the public welfare and the Comprehensive Plan.

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(4) General standards.

(a) The Zoning Hearing Board, before granting a special exception for any use, must find that the use and the operations in connection with it would be in harmony with the orderly and appropriate development of the zone. In particular, the Board must make the following findings in writing:

[1] Use. That the items below are in harmony with the orderly and appropriate development of the zone:

[a] Location of the use, including location with respect to the existing or future streets giving access to it.

[b] Nature and intensity of the operations involved.

[2] Facilities and services. That adequate water, sewerage, storm drainage and fire and police protection are or can be provided for the use.

[3] Buildings, walls and fences. That the use of adjacent land and buildings will not be discouraged and the value of adjacent land and buildings will not be impaired by the location, nature and height of buildings, walls and fences.

[4] Traffic. That the use will not create traffic congestion or cause commercial or industrial traffic to use residential streets.

(b) Additional findings or considerations to weigh for particular uses follow in the remainder of this section.

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(5) Shopping center standards. In passing upon special exception applications for shopping centers, the Zoning Hearing Board must require the following:

(a) Location. Have access to a major thoroughfare so as to avoid traffic on residential streets.

(b) Parking. Adequate site area, permitting parking space at the ratio of parking space to gross floor area of four to one (4:1).

(c) Design. Site and building design, in order to provide and maintain, where appropriate, a proper buffer of un-built-on space between the shops and adjoining uses.

(d) Control. Control of uses to minimize disturbances to residential areas.

(6) Standards for alteration or expansion of nonconformities. In passing upon a special exception application for the expansion of nonconformities, the Zoning Hearing Board must require the following:

(a) Expansion confined to lot. That expansion of the nonconformity be confined to the lot on which the use is located.

(b) Access, parking and loading. Provision of access drives, off-street parking and off-street loading consistent with standards required by this ordinance.

(c) Yards, height and building areas. Provision of yards, building height and building area consistent with the standards required for permitted uses in the zone in which the nonconformity in question is located.

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(d) Appearance. That the appearance is harmonious with surrounding properties. This feature includes, but is not limited to, landscaping, enclosure or principal and accessory uses, height control, sign control, architectural control and maintenance in good condition of all improvements and open spaces.

(e) Buffers and screens. Buffers and screens as necessary to adequately protect neighboring properties, including but not limited to fences, walls, plantings and open spaces.

(f) Additional requirements. Such additional requirements as may be necessary to assume that the proposed alteration or expansion will not impair the use or development of neighboring properties.

C. Variances.

(1) Referral to Planning Commission. All applications for a variance must be referred to the Borough Planning Commission for a report.

(2) Standards for variances. Where there is unnecessary hardship, the Board may grant a variance in the application of the provisions of this ordinance, provided that the following findings are made where relevant in a given case:

(a) There are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and is not due to circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or zone in which the property is located.

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(b) Because of these physical circumstances or conditions, the property cannot reasonably be used in strict conformity with the provisions of the Zoning Ordinance.

(c) The unnecessary hardship is not financial in nature and has not been created by the appellant.

(d) The variance, if authorized, will not alter the essential character of the neighborhood or zone in which the property is located, will not substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(e) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(3) Conditions. In granting any variance, the Board may attach such reasonable conditions and safeguards as it considers necessary to implement the purposes of this Zoning Ordinance.

(4) Granting of temporary permits.

(a) The Zoning Hearing Board may grant a temporary permit for a nonconforming use or structure, existing or new, which:

[1] Is beneficial to the public health or general welfare; or

[2] Is necessary to promote the proper development of the community; or

[3] Is seasonal in nature.

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(b) The permit may be issued for a period not exceeding one (1) year, and may be renewed for an aggregate period not exceeding three (3) years. The nonconforming structure or use must be completely removed upon the expiration of the permit without cost to the borough.

D. Public hearings.

(1) Notice; conduct of meeting.

(a) Notice shall be given to the public, the applicant, the Zoning Officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for the same. Notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provision, by the rules of the Board. The governing body shall establish reasonable fees, based on cost, to be paid by the applicant and by persons requesting any notice not required by ordinance.

(b) The hearings shall be conducted by the Board. The decision or, where no decision is called for, the findings shall be made by the Board. Formal rules of evidence shall not apply, but irrelevant, immaterial or unduly repetitious evidence may be excluded.

(c) The Board shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communications, reports, staff memoranda or other materials unless the parties are

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afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.

(2) Representation; statements.

(a) The parties to the hearing shall be the borough, any person affected by the application who has made timely appearance of record before the Board and any other person, including civic or community organizations, permitted to appear by the Board. The Board shall have the power to require that all persons who wish to be considered parties enter appearances, in writing, on forms provided by the Board for that purpose.

(b) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.

(c) Statements are to be made in the following order or as the Chairman may direct:

[1] Applicant or appellant.

[2] Zoning Officer and other officials.

[3] Any private citizen.

(d) The applicant or appellant must be given opportunity for rebuttal.

(3) Witnesses. The Chairman or Acting Chairman of the Board presiding shall have power to ad-

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minister oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.

(4) Decision procedure.

(a) The Board shall render a written decision or, when no decision is called for, make written findings on the application within forty-five (45) days after the last hearing before the Board. Each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this ordinance or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. Where the Board has the power to render a decision and the Board fails to render the same within the period required by this subsection, the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time.

(b) A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have filed their name and address with the Board not later than the last day of the hearing, the Board shall provide, by mail or otherwise, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

(c) Whenever the Board imposes a condition or conditions with respect to the granting of an applica-

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tion or appeal, this condition must be stated in the order of the Board and in the permit issued pursuant to the order by the Zoning Officer. This permit remains valid only as long as the condition upon which it was granted or the conditions imposed by this ordinance are adhered to.

(5) Zoning appeals to court.

(a) Zoning appeals shall include appeals from the decision of the Zoning Hearing Board and appeals upon report of the Board in the proceedings to challenge the validity of any ordinance or map.

(b) Zoning appeals may be taken to court by any party before the Board or any officer or agency of the borough.

(c) The procedure to be followed in filing appeals to court shall be in accordance with Article X, Pennsylvania Municipalities Planning Code, Act 247, as amended.⁸

(6) Records. The Board shall keep a stenographic record of the proceedings and a transcript of the proceedings, and copies of graphic or written material received in evidence shall be made available to any party at cost.

§100-96. Borough Engineer.

A. Drainage. At the request of the Zoning Officer or the Zoning Hearing Board, the Borough Engineer must review site plans or other data to ascertain

⁸ Editor's Note: See 53 P.S. §11001 et seq.

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that provision for surface water drainage will be adequate.

B. Buildings adjacent to drainage channels and watercourses. The Borough Engineer shall review plans for buildings adjacent to drainage channels or watercourses to ascertain that the buildings will be an adequate distance from the high water line.

C. Zoning Hearing Board cases. Where the exercise of his powers and duties involves an application or appeal to the Zoning Hearing Board, the Borough Engineer shall make recommendations to the Board. The approving authority in such cases shall be the Zoning Hearing Board and not the Borough Engineer.

§100-97. Planning Commission.

A. Zoning Hearing Board cases. Within thirty (30) days of receiving an application for a special exception or variance from the Zoning Hearing Board, the Borough Planning Commission must give written report on it to the Board.

B. Amendments. The Borough Planning Commission may recommend amendments to the regulations and provisions of this Zoning Ordinance to the Borough Council. For a proposed amendment stemming from other sources, the Commission must review it and make a recommendation regarding it to the Borough Council within thirty (30) days after receipt of the proposal. At least thirty (30) days prior to the Borough Council's hearing on the amendment to the ordinance, the Borough Planning Commission shall submit the proposed amendment to the ordi-

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nance to the Columbia County Planning Commission for recommendation.

C. Screens where C and I Districts abut R Districts. In reviewing plans for fences or hedges where a C or I District abuts an R District, the Borough Planning Commission must accept or refuse the plans, depending on their adequacy for this purpose.

§100-98. Borough Council.

A. Appointment of Zoning Officer. The Borough Council must appoint a Zoning Officer who may not hold any elective office in the borough and who shall administer this ordinance in accordance with its literal terms. As the enforcement officer for this ordinance, he issues all building permits, use certificates and, at the direction of the Zoning Hearing Board, special exceptions and variances.

B. Appointment of Zoning Hearing Board. The Borough Council must appoint three (3) residents of the borough to a Zoning Hearing Board. No member may hold any other borough office except Planning Commissioner. Only one (1) Planning Commissioner may be appointed to the Board. The Council must designate one (1) member to serve until the first day of January following the effective date, one (1) member to serve until the first day of the second January thereafter and one (1) member to serve until the first day of the third January thereafter. Successors must be appointed on the expiration of the respective terms above to serve three (3) years. Appointments to fill vacancies must be only for the unexpired portion of the terms.

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C. Amendments. The Borough Council may from time to time on its own motion or on petition or on recommendation of the Borough Planning Commission amend, supplement or repeal any of the regulations and provisions of this ordinance. Before voting on the enactment of an amendment, the Borough Council shall hold a public hearing thereon, pursuant to public notice. In the case of curative amendments, the Borough Council shall commence a hearing thereon within sixty (60) days of the request. In the case of an amendment other than that prepared by the Borough Planning Commission, the Borough Council shall submit each such amendment to the Borough Planning Commission at least thirty (30) days prior to the hearing on such proposed amendment to provide the Borough Planning Commission an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised or further revised to include land previously not affected by it, the Borough Council shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment.

ARTICLE XVIII
General Provisions

§100-99. Conflicting provisions.

In their interpretation and application, the provisions of this ordinance shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. Wherever the requirements of this ordinance are at variance with the require-

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ments of any other lawfully adopted rules, regulations, ordinances, deed restrictions or covenants, the most restrictive or that imposing the higher standards shall govern.

§100-100. Repealer.

All ordinances or parts of ordinances in conflict with this Zoning Ordinance or inconsistent with the provisions of this ordinance are hereby repealed to the extent necessary to give this ordinance full force and effect.

§100-101. Severability.

If any section, clause, provision or portion of this ordinance shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this ordinance which is not in itself invalid or unconstitutional.

§100-102. When effective.

This ordinance shall take effect and be in force immediately after its adoption and advertisement, the public welfare demanding it.

*Borough of Berwick Obscenity Ordinance*ORDINANCE NO. 1158

An Ordinance of the Borough of Berwick, County of Columbia, State of Pennsylvania, Prohibiting the Sale of Lewd, Obscene, Pornographic Publications and Material, and/or the Establishment of Adult Book Stores; Defining the Terms and Activities Intended to be Prohibited; Declaring the Prohibited Activities to be Public Nuisance per se; Fixing Penalties Thereon Including Proceedings for Abatement Thereon.

WHEREAS, the Borough of Berwick Council finds and determines there is a great increase in the number and variety of books, magazines and other publications of the type prohibited by this ordinance being displayed and offered for sale within the Borough of Berwick; and

WHEREAS, certain books, magazines and other publications specified in this ordinance deal in substantial part with subject matter of an obscene or lewd nature and are pornography as defined herein, tending to deprive the morals of those into whose possession the publication might fall, by suggesting lewd thoughts and exciting sensual desires; and

WHEREAS, certain books, magazines, and other publications, of types prohibited in this ordinance deal in substantial part with subject matter of an obscene or lewd nature to incite the reader or viewer, especially those of a susceptible and impressionable nature and/or those under sixteen (16) years of age, to commit acts similar to or identical to the activity portrayed; and

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WHEREAS, Borough of Berwick Council has determined the need for defining and prohibiting the establishment of certain businesses known as Adult Book Stores, and/or Adult Motion Picture Theatres conducting prohibited activities therein or thereon, as a public nuisance and not in the best interest of the citizens and residents of the Borough of Berwick.

Be it Ordained and Enacted by the Borough of Berwick, Columbia County, State of Pennsylvania, and it is Hereby Ordained and Enacted by Authority of the Same, as Follows:

ARTICLE I*Definitions*

1. As used in this ordinance, the following terms shall have the meaning indicated.

Definitions:

(A) *Lewd-Obscene Pornography*—Any matter which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest and which depicts or describes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or masturbation, excretory functions, or the exhibition of nude anatomical areas.

(B) *Adult Book Stores* means a commercial establishment having a significant portion of its stock in trade, books, magazines, photographs or other material which are distinguished or characterized by their emphasis or matter depicting, describing, or relating to "specified sexual activities; or specified "anatomical

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areas", or an establishment with a significant part or portion of its stock devoted to the sale or display of such material.

(C) *Adult Motion Picture Theatres* means any commercial place where lewd-obscene, or pornographic film or matter, or performances as described as prohibited herein are shown or displayed.

(D) *Matter*—A film, tape, recording, or a publication or any of them, singularly or together.

(E) *Motion Picture Film*—Includes any film or plate negative; film or plate positive; film designed to be projected on a screen or other surface for exhibition; films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen or other surface; and videotape or any other medium used to electronically reproduce images on a screen or other surface.

(F) *Nude*—Completely without clothing, or showing

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, or female breast below a point immediately above the areola; or

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(G) *Person*—Any individual, partnership, firm, association, corporation or other legal entity.

(H) *Place*—Includes but is not limited to any building, structure, or space or any separate part or

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portion thereof, whether permanent or not, or the ground itself.

(I) *Publication*—Includes any book, magazine, article, pamphlet, writing, printing, illustration picture, sound recording or motion picture film, which is displayed in an area open to the public or is offered for sale or exhibited in a coin or otherwise electronically operated machine.

(J) *Sale*—A passing of title or right of possession from a seller to a buyer for valuable consideration, and, includes but it is not limited to any lease or rental arrangement, or other transaction wherein or whereby the use of or transfer of possession of lewd-obscene pornography matters as defined herein, is completed.

Intent:

(A) For the purposes of this ordinance the possession and display of pornography shall be prima facie the intent to sale or transfer possession thereof.

Nothing herein contained is intended to include or prescribe any matter which, when considered as a whole and in the context in which it is used, possesses serious literary, artistic, political, educational or scientific value.

ARTICLE II

2. Possession and display of lewd, obscene, or pornographic materials for sale of, or the intent to transfer possession of; the conducting of adult book store, the exhibition of lewd, obscene, or pornographic materials or films, as defined herein, are prohibited activities.

(A) Any and every place within the Borough of Berwick where lewd, obscene, or pornographic mate-

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rials and/or publications or films are possessed or publicly exhibited and offered for sale or transfer, or viewing, or places within the Borough of Berwick where said films, publications, materials, or matter are exhibited and/or offered for sale or transfer, or viewing for consideration, or where said materials, or publications, or matters, or films, as defined herein, are publicly disseminated or sold or possessed for such dissemination, is prohibited and is a public nuisance.

(B) Any and every lewd, obscene, or pornographic material, and/or publication, or film, which is publicly exhibited or possessed for such purpose, or is possessed with intent to sell or transfer possession, at a place which is a public nuisance under Sub-section II-2(A) above is a public nuisance per se.

(C) From and after service on the place or its manager or acting manager or person then in charge of such place, of a true and correct copy of this Ordinance and order of summary abatement provided for in Article III hereof, all moneys paid thereafter as admission price to such exhibition or as purchase price or consideration for transfer of possession, are declared to be a public nuisance as personal property used in conducting and maintaining a declared public nuisance.

(D) From and after the passage of this ordinance it shall be unlawful for any person or business to sell, offer for sale, attempt to sell, possess and display with intent to sell, transfer, display for viewing, by or to child or children, under the age of seventeen (17) years, any lewd, obscene, or pornographic materials

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publications, matter, or film as defined herein, and such activities conducted within the Borough of Berwick shall and are declared to be a public nuisance subject to the penalty and abatement proceedings as provided hereinafter.

ARTICLE III

Liability; Abatement

3. Upon and after receiving notice as provided herein and a notice of order of summary abatement provided in Article IV-4(D) any and every person who shall own, lease, maintain, legally, or equitable; manage, conduct, or operate a place within the Borough of Berwick which is declared to be a public nuisance, as set forth and stated in this Ordinance in Article II-2(A) and (B), is deemed to be a person who has knowledge of such nuisance for the purpose of this Article and is therefore responsible for its maintenance and continuance, and shall be liable therefore.

The places and subject matter declared to be public nuisance under Article II-2(A) and (B) shall be abated as provided for herein.

ARTICLE IV

Abatement Procedure

4. Upon a specific finding that a public nuisance, as defined herein, existed within the Borough of Berwick, the Police Department, in applying the provisions of this article to such nuisance, shall:

(A) Declare the fact that such nuisance exists.

(B) Set forth the description or legal description and street address of the place which constitutes the

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nuisance, the home and address of record owner thereof, and the name of manager or person in charge, when known.

(C) Set forth the evidentiary facts considered by Police Department in arriving at its factual determination.

(1) In the case of books, publications, or magazines, such facts shall include a recitation of the particular books, publications, or magazines or types considered by the Police Department; in the case of motion picture film or films, which the Police Department finds are patently offensive, or other paraphernalia, a recitation of the particular sexual conduct and acts which the Police Department finds are patently offensive; the basis for the finding by the Police Department, that such publications, film or films, or other paraphernalia, are displayed, sold or held for sale at any place found by the Police Department to be a public nuisance; and the basis of the finding by the Police Department that such books, publications, or magazines, or in the case of films or other paraphernalia constitutes a part of the stock-in-trade of such place of business or other place.

(D) Under the Authority of Borough of Berwick Council, order all persons described in Article II herein to summarily abate such public nuisance within twenty-four (24) hours of service of such order on any such subject matter or to cease to use the place where the nuisance is declared to exist, or to terminate the use of said premises for the purpose of

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possessing, displaying, and/or selling or transfer of possession of, or exhibiting, lewd, obscene pornographic publications and/or films and other paraphernalia, or to cause the same to be terminated.

(E) Request the Solicitor to proceed to do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as possible, including requesting the Court to advance proceedings on the court calendar as provided by law or judicial administration procedure. Borough Council shall be required to give formal approval to action taken by Solicitor upon request of Police Department.

(F) Inform and give notice in writing to persons designated that:

(1) Police Department has determined a public nuisance presently exists at such place and address; the activities which constitute the public nuisance; and that, under Article III of this Ordinance, they are deemed to have knowledge thereof and are responsible therefore.

(2) In the event the order of the Borough of Berwick has not been complied with within the twenty-four (24) hours, the Police Department may request the Solicitor, as provided under Article III(E), to commence necessary civil legal proceedings to abate the same judicially, the costs of abatement of such public nuisance, in such proceedings shall include investigative costs, court costs, attorneys' fees where authorized by law, and other expenses, are made a special assessment against the parcel of land upon

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which such nuisance is being maintained and, upon their determination in such court action and allowances as such, shall be made a municipal lien against such property and a personal obligation against any person, persons, firm, association, partnership, corporation, or other entity deemed to be in violation of this ordinance.

(3) All lewd, obscene, and/or pornographic publications, film, or paraphernalia being used in conducting, or displayed on the premises in which such public nuisance is being conducted and maintained, and being an integral part of the conduct of the activities described as a public nuisances herein, are contraband and the subject of forfeiture.

(4) From and after service on the place or its manager or acting manager or person then in charge of such place, of a true and correct copy of the notice required by this Ordinance, any and all money paid or other consideration received, for the sale or transfer of possession of lewd, obscene, or pornographic publications, or other paraphernalia prohibited herein, or for admission price to or for the exhibition or display thereon, are a public nuisance as personal property used in conducting and maintaining such nuisance did, as such, are the subject of forfeiture.

(G) Order a true and correct copy of this Article be delivered forthwith in any manner normally used to effectuate personal service of process to all persons of record having any legal or equitable interest in the

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real property and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

ARTICLE V

Forfeiture of revenues from Public Nuisances; Cost of Abatement, Recovery of Costs

5. Upon judgment in favor of Borough of Berwick in any legal proceedings instituted hereunder revenues or other consideration forfeited as provided in this Ordinance shall be forfeited to general fund of Borough of Berwick; proceedings shall also include claim for recovery of investigative, court cost, trial expense and reasonable attorneys' fees as provided herein; the cost of said abatement proceedings upon judgment are recoverable as a special assessment against the parcel of real estate or personal obligation against the person conducting the activities constituting the public nuisance and abated by legal proceedings.

(A) In abatement proceedings upon judgment in favor of the Borough of Berwick, an accounting shall be made by the defendant of all moneys or consideration received which have been declared to be a public nuisance under Article II. Such money, consideration, or equivalent, shall be forfeited to the general fund of the Borough of Berwick or as property of the Borough of Berwick if the consideration is not money.

(B) The cost of abatement proceedings shall include the following:

- (1) Investigative cost
- (2) Court costs

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(3) Reasonable attorneys' fees arising out of the preparation for and trial of the cause and appeals, and other costs allowed on appeal including but not limited to transcript.

(4) Printing cost of trial, briefs and all other litigation proceedings relating to order.

(C) Cost of abatement is hereby made a special assessment against the parcel of land upon which such nuisance is maintained. Upon determination of cost in a civil action, such shall, by separate legal proceedings, be made a lien against such property and a personal obligation against any person, persons, firm, association, partnership, corporation or other entity and shall be collected in the same manner as ordinary municipal tax and claim liens are collected, subject to the same interest, penalty and procedure set forth in statute. All laws applicable to the levy, collection and enforcement of municipal taxes and claims shall be applicable to such special assessment.

ARTICLE VI

6. This ordinance shall not be construed to apply to the ordinary and general dissemination of news, nor to drawings and photographs used therein, and shall not apply to publications of generally recognized educational, literary, or artistic value or features.

ARTICLE VII

Severability

7. The provisions of this Ordinance shall be severable and if any provision or part thereof shall be held to be unconstitutional, invalid or illegal, by any court of competent jurisdiction, such decision shall not affect the validity of

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any of the remaining provisions of this Ordinance. It is hereby declared as legislative intent that this Ordinance would have been enacted had such unconstitutional, invalid or illegal provision not been included herein.

ARTICLE VIII

Repealer

8. Ordinance No. 695, adopted 9/10/56, all amendments thereto, and all other ordinances and parts of ordinances inconsistent herewith are hereby repealed.

ARTICLE IX

Effective Date

9. This Ordinance shall take effect and be in force upon its adoption as provided by law.

PASSED AND ENACTED as Ordinance of the Borough of Berwick by Council at regular meeting of Borough of Berwick Council held the 20th day of September 1982 at 7:30 P.M., 344 Market Street, Berwick, Pennsylvania.

Borough of Berwick

s/Illegible

By: President of Council

Attest to:

s/Illegible

Approved this 20th day of September 1982

s/Illegible

Mayor

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ARTICLE I. GENERAL PROVISIONS

Library References

Municipal Corporations 41 et seq. P.L.E. Municipal Corporations § 1. C.J.S. Municipal Corporations §§ 83, 84.

§10101. Short title

This act shall be known and may be cited as the "Pennsylvania Municipalities Planning Code."

1968, July 31, P.L. 805, art. I, § 101.

§10102. Effective date

This act shall take effect January 1, 1969. 1968, July 31, P.L. 805, art. I, § 102.

§10103. Construction of act

The provisions of this act shall not affect any act done, contract executed or liability incurred prior to its effective date, or affect any suit or prosecution pending or to be instituted, to enforce any right, rule, regulation, or ordinance or to punish any offense against any such repealed laws or against any ordinance enacted under them. All ordinances, resolutions, regulations¹ and rules made pursuant to any act of Assembly repealed by this act shall continue in effect as if such act had not been repealed, except as the provisions are inconsistent herewith. The provisions of other acts relating to municipalities and townships are made a part of this act and this code shall be construed to give effect to all provisions of other acts not specifically repealed.

¹ Enrolled bill omitted "regulations".

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1968, July 31, P.L. 805, art. I, § 103; 1972, June 1, P.L. —, No. 93, § 103, effective in 60 days.

§10104. Constitutional construction

The provisions of this act shall be severable, and if any of its provisions shall be held to be unconstitutional, the validity of any of the remaining provisions of this act shall not be affected. It is hereby declared as the legislative intention that this act would have been adopted had such unconstitutional provision not been included therein.

1968, July 31, P.L. 805, art. I, § 104.

§10105. Purpose of act

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources; and to permit municipalities, other than cities of the first and second class, to minimize such problems as may presently exist or which may be foreseen. It is the further intent of this act that any recommendations made by any planning agency to any governing body shall be advisory only.

As amended 1972, June 1, P.L. 333, No. 93, § 1, effective in 60 days; 1982, June 23, P.L. 613, No. 173, § 2, effective in 60 days.

*Pennsylvania Municipalities Planning Code***§10106. Appropriations, grants and gifts**

The governing body of every municipality is hereby authorized and empowered to make such appropriations as it may see fit, to accept gifts, grants or bequests from public and private sources for the purpose of carrying out the powers and duties conferred by this act, and to enter into agreements regarding the acceptance or utilization of such grants, gifts or bequests.

1968, July 31, P.L. 805, art. I, § 106.

§10107. Definitions

As used in this act, except where the context clearly indicates otherwise, the following words or phrases have the meaning indicated below:

(1) "Applicant," a landowner or developer, as hereinafter defined, who has filed an application for development including his heirs, successors and assigns.

(2) "Application for development," every application, whether preliminary or final, required to be filed and approved prior to start of construction or development including but not limited to an application for a building permit, for the approval of a subdivision plat¹ or plan or for the approval of a development plan.

(3) "Appointing authority," the mayor in cities; the chairman of the board of commissioners in counties; the council in incorporated towns and boroughs; the board of commissioners in townships of the first class; and the board of supervisors in townships of the second class; or as may be designated in the law providing for the form of government.

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(4) "Common open space," a parcel or parcels of land or an area of water, or a combination of land and water within a development site and designed and intended for the use or enjoyment of residents of the planned residential development, not including streets, off-street parking areas, and areas set aside for public facilities.

(5) "City" or "Cities," cities of the second class A and third class.

(6) "County," any county of the second class A through eighth classes.

(7) "Development plan," the provisions for development of a planned residential development, including a plat of subdivision, all covenants relating to use, location and bulk of buildings and other structures, intensity of use or density of development, streets, ways and parking facilities, common open space and public facilities. The phrase "provisions of the development plan" when used in this act shall mean the written and graphic materials referred to in this definition.

(8) "Developer," any landowner, agent of such landowner or tenant with the permission of such landowner, who makes or causes to be made a subdivision of land or a land development.

(9) "Engineer," a professional engineer licensed as such in the Commonwealth of Pennsylvania, duly appointed as the engineer for a municipality, planning agency, or joint planning commission.

(10) "Governing body," the council in cities, boroughs and incorporated towns; the board of commissioners in townships of the first class; the board of supervisors in townships of the second class; the board of commissioners

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in counties of the second class A through eighth classes or as may be designated in the law providing for the form of government.

(11) "Land development," (i) the improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving (a) a group of two or more buildings, or (b) the division or allocation of land or space between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features; (ii) a subdivision of land.

(12) "Landowner," the legal or beneficial owner or owners of land including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition), a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land, shall be deemed to be a landowner for the purposes of this act.

(12.1) "Mobilehome," means a transportable, single family dwelling intended for permanent occupancy, office or place of assembly contained in one unit, or in two units designed to be joined into one integral unit capable of again being separated for repeated towing, which arrives at a site complete and ready for occupancy except for minor and incidental unpacking and assembly operations, and constructed so that it may be used without a permanent foundation.

(12.2) "Mobilehome lot," a parcel of land in a mobilehome park, improved with the necessary utility connections and other appurtenances necessary for the erections thereon of a single mobilehome, which is leased by

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the park owner to the occupants, of the mobilehome erected on the lot.

(12.3) "Mobilehome park," a parcel of land under single ownership which has been planned and improved for the placement of mobilehomes for nontransient use, consisting of two or more mobilehome lots.

(13) "Municipality," any city of the second class A or third class, borough, incorporated town, township of the first or second class, county of the second class A through eighth class, or any similar general purpose unit of government which shall hereafter be created by the General Assembly.

1968, July 31, P.L. 805, No. 247, art. I, § 107. As amended 1972, June 1, P.L. 333, No. 93, § 1, effective in 60 days.

(13.1) "Nonconforming use," means a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.

(13.2) "Nonconforming structure," means a structure or part of a structure manifestly not designed to comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such structure lawfully existed prior to the enactment of such ordinance or amendment or prior to the application of such ordinance or amendment to its location by reason of annexation. Such nonconforming structures include, but are not limited to nonconforming signs.

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(14) "Planned residential development," an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, the development plan for which does not correspond in lot size, bulk or type of dwelling, density, lot coverage and required open space to the regulations established in any one residential district created, from time to time, under the provisions of a municipal zoning ordinance.

(15) "Planning agency," a planning commission, planning department, or a planning committee of the governing body.

(16) "Plat" the map or plan of a subdivision or land development, whether preliminary or final.

(17) "Public grounds," includes (i) parks, playgrounds and other public areas; and (ii) sites for schools, sewage treatment, refuse disposal and other publicly owned or operated facilities.

(18.1) "Renewable energy source," means any method, process or substance whose supply is rejuvenated through natural processes and, subject to those natural processes, remains relatively constant, including, but not limited to, biomass conversion, geothermal energy, solar and wind energy and hydroelectric energy and excluding those sources of energy used in the fission and fusion processes.

Added 1982, June 23, P.L. 613, No. 173, § 3, effective in 60 days.

(19) "Street," includes street, avenue, boulevard, road, highway, freeway, parkway, lane, alley, viaduct and any other ways used or intended to be used by vehicular traffic or pedestrians whether public or private.

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(20) "Structure," any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.

(21) "Subdivision," the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, transfer of ownership or building or lot development: Provided, however, That the subdivision by lease of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access or residential dwellings, shall be exempted.

As amended 1982, June 24, P.L. 628, No. 177, § 1, imd. effective.

(22) "Substantially completed," where, in the judgment of the engineer, at least ninety per cent (based on the cost of the required improvements for which financial security was posted pursuant to section 509¹) of those improvements required as a condition for final approval have been completed in accordance with the approved plan, so that the project will be able to be used, occupied or operated for its intended use.

Added 1982, June 9, P.L. 441, No. 130, § 1, effective in 60 days.

ARTICLE VI. ZONING**§10601. General powers**

The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.

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1968, July 31, P.L. 805, art. VI, § 601.

§10603. Ordinance provisions

Zoning ordinances may permit, prohibit, regulate, restrict and determine:

- (1) Uses of land, watercourses and other bodies of water;
- (2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;
- (3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures;
- (4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

- (1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;
- (2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;
- (3) Provisions for the administration and enforcement of such ordinances; and
- (4) Such other provisions as may be necessary to implement the purposes of this act.

1968, July 31, P.L. 805, art. VI, § 603.

*Pennsylvania Municipalities Planning Code***§10604. Zoning purposes**

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, civil defense, disaster, evacuation, airports, and national defense facilities, the provisions of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, public grounds and other public requirements, as well as

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. Zoning ordinances shall be made in accordance with an overall program, and with consideration for the character of the municipality, its various parts and the suitability of the various parts for particular uses and structures.

1968, July 31, P.L. 805, art. VI, § 604.

(3) To preserve prime agricultural and farmland considering topography, soil type and classification, and present use.

As amended 1978, Nov. 26, P.L. 1209, No. 284, § 1, imd. effective.

§10614. Appointment and powers of zoning officer

For the administration of a zoning ordinance, a zoning officer, who may not hold any elective office in the municipality, shall be appointed. The zoning officer shall administer the zoning ordinance in accordance with its literal

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terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

1968, July 31, P.L. 805, art. VI, § 614; 1972, June 1, P.L. —, No. 93, § 614, effective in 60 days.

§10615. Zoning appeals

All appeals from decisions of the zoning officer shall be taken in the manner set forth in this act.

1968, July 31, P.L. 805, art. VI, § 615.

ARTICLE IX. ZONING HEARING BOARD**§10901. Creation of board**

Every municipality which has enacted or enacts a zoning ordinance pursuant to this act or prior enabling laws, shall create a zoning hearing board. As used in this act, unless the context clearly indicates otherwise, the term "board" shall refer to such zoning hearing board.

1968, July 31, P.L. 805, art. IX, § 901.

§10902. Existing boards of adjustment

Every board of adjustment or board of appeals in existence when this act becomes effective shall thereupon become a zoning hearing board, be known as such, and it and the terms of its members shall continue under and in accordance with the provisions of this article. Matters pending before any board of adjustment or board of appeals at the time this act becomes effective shall continue and be completed under the former law in effect at the time such board took jurisdiction of them.

1968, July 31, P.L. 805, art. IX, §902.

§10903. Membership of board

(a) The membership of the board shall, upon the termination of the governing body, consist of either three or five residents of the municipality appointed by the governing body. The terms of office of a three member board shall be three years and shall be so fixed that the term of office of one member shall expire each year. The terms of office of a five member board shall be three years and shall be so fixed that the term of office of no more than two members of a five member board shall expire each year and of the initial appointments of the two additional members, one shall be appointed for a one year term and one shall be appointed for a two year term. If a three member board is changed to a five member board, the members of the existing three member board shall continue in office until their term of office would expire under prior law. The governing body shall appoint two additional members to the board with terms scheduled to expire in accordance with the provisions of this section. The board shall promptly notify the governing body of any vacancies which occur. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members of the board shall hold no other office in the municipality, except that no more than one member of the board may also be a member of the planning commission.

(b) A five member board shall not be changed to a three member board except upon an affirmative vote on the question by a majority of the electors of the municipality voting thereon at a referendum held at the municipal or general election prior to a year in which the terms of two of the members on the board expire.

As amended 1978, Oct. 4, P.L. 990, No. 203, § 1, effective in 60 days

*Pennsylvania Municipalities Planning Code***§10904. Joint zoning hearing boards**

Two or more municipalities may, by ordinances enacted in each, create a joint zoning hearing board in lieu of a separate board for each municipality. A joint board shall consist of two members appointed from among the residents of each municipality by its governing body. The term of office of members of joint boards shall be five years, except that of the two members first appointed from each municipality, the term of office of one member shall be three years. When any vacancies occur, the joint board shall promptly notify the governing body which appointed the member whose office has become vacant, and such governing body shall appoint a member for the unexpired portion of the term. Members of the joint board shall hold no other office in the participating municipality, except that no more than one member of the board appointed by any municipality may also be a member of a planning commission of the municipality from which such appointment is made. In all other respects, joint zoning hearing boards shall be governed by provisions of this act not inconsistent with the provisions of this section.

1968, July 31, P.L. 805, art. IX, § 904.

§10905. Removal of members

Any board member may be removed for malfeasance, misfeasance, of nonfeasance in office or for other just cause by a majority vote of the governing body which appointed the member, taken after the member has received fifteen days' advance notice of the intent to take such vote. A hearing shall be held in connection with the vote if the members shall request it in writing.

1968, July 31, P.L. 805, art. IX, § 905.

*Pennsylvania Municipalities Planning Code***§10906. Organization of board**

The board shall elect from its own membership its officers, who shall serve annual terms as such and may succeed themselves. For the conduct of any hearing and the taking of any action, a quorum shall be not less than a majority of all the members of the board, but the board may appoint a hearing officer from its own membership to conduct any hearing on its behalf and the parties may waive further action by the board as provided in section 908.¹ The board may make, alter and rescind rules and forms for its procedure, consistent with ordinances of the municipality and laws of the Commonwealth. The board shall keep full public records of its business and shall submit a report of its activities to the governing body once a year.

As amended 1978, Oct 4, P.L. 990, No. 203 §2, effective in 60 days.

§10907. Expenditures for services

Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants and other technical and clerical services. Members of the board may receive compensation for the performance of their duties, as may be fixed by the governing body, but in no case shall it exceed the rate of compensation authorized to be paid to the members of the governing body.

1968, July 31, P.L. 805, art. IX, § 907.

¹ Section 10908 of this title.

*Pennsylvania Municipalities Planning Code***§10908. Hearings**

The board shall conduct hearings and make decisions in accordance with the following requirements:

(1) Notice shall be given to the public, the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for the same. Notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provision, by rules of the board. The governing body may establish reasonable fees, based on cost, to be paid by the applicant and by persons requesting any notice not required by ordinance. In addition to the notice provided herein, notice of said hearing shall be conspicuously posted on the affected tract of land.

As amended 1974, Dec. 10, P.L. 822, § 272, § 1.

(2) The hearings shall be conducted by the board or the board may appoint any member as a hearing officer. The decision, or, where no decision is called for, the findings shall be made by the board, but the parties may waive decision or findings by the board and accept the decision or findings of the hearing officer as final.

(3) The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

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(4) The chairman or acting chairman of the board or the hearing officer presiding shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.

(5) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and¹ cross-examine adverse witnesses on all relevant issues.

(6) Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.

(7) The board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings and a transcript of the proceedings and copies of graphic or written material received in evidence shall be made available to any party at cost.

(8) The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.

¹ Enrolled bill omitted "argument and".

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(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within forty-five days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than forty-five days after the decision of the hearing officer. Where the board fails to render the decision within the period required by this subsection, or fails to hold the required hearing within sixty days from the date of the applicant's request for a hearing, the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the municipality shall give public notice of said decision within ten days in the same manner as provided in subsection (1) of this section. Nothing in this subsection shall prejudice the right of any party opposing the application to urge that such decision is erroneous.

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As amended 1974, Dec. 10, P.L. 822, No. 272, § 1; 1978, Oct. P.L. 1067, No. 249, § 4, imd. effective; 1979, July 13, P.L. 105, No. 43 § 1, imd. effective.

(10) A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have filed their name and address with the board not later than the last day of the hearing, the board shall provide by mail or otherwise, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

1968, July 31, P.L. 805, art. IX, § 908; 1972, June 1, P.L. —, No. 93, § 908, effective in 60 days.

§10909. Board's functions: appeals from the zoning officer

The board shall hear and decide appeals where it is alleged by the appellant that the zoning officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map or any valid rule or regulation governing the action of the zoning officer. Nothing contained herein shall be construed to deny to the appellant the right to proceed directly in court, where appropriate, pursuant to Pa.R.C.P., sections 1091 to 1098¹ relating to mandamus.

1968, July 31, P.L. 805, art. IX, § 909.

§10910. Board functions: challenge to the validity of any ordinance or map

The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section

¹ Probably should read "rules 1091 to 1098".

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1003¹ and subsection (1)(b) of section 1004.² In all such challenges, the board shall take evidence and make a record thereon as provided in section 908.³ At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.

1968, July 31, P.L. 805, art. IX, § 910; 1972, June 1, P.L. —, No. 93, § 910, effective in 60 days.

¹ Section 11003 of this title.

² Section 11004 of this title.

³ Section 10908 of this title.

§10911. Repealed. 1972, June 1, P.L. —, No. 93, § 15

§10912. Board's functions; variances

The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. Subject to the provisions of section 801,¹ the board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance provided the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;

¹ Section 10801 of this title.

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(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That such unnecessary hardship has not been created by the appellant;

(4) That the variance, if authorized, will not alter the essential character of the neighborhood, or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

1968, July 31, P.L. 805, art. IX, § 912.

§10913. Board's functions; special exceptions

Where the governing body in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those

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expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

1968, July 31, P.L. 805, art. IX, § 913.

§10913.1 Unified appeals

Where the board has jurisdiction over a zoning matter pursuant to sections 909 through 912,¹ the board shall also hear all appeals which an applicant may elect to bring before it with respect to any municipal ordinance or requirement pertaining to the same development plan or development. In any such case, the board shall have no power to pass upon the nonzoning issues, but shall take evidence and make a record thereon as provided in section 908.² At the conclusion of the hearing, the board shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court. The provisions of this section shall not apply to cities of the first and second class.

1972, June 1, P.L. —, No. 93, § 913.1, effective in 60 days.

§10914. Parties appellant before board

Appeals under section 909¹ and proceedings to challenge an ordinance under section 910² may be filed with the board in writing by the landowner affected, any officer or agency of the municipality, or any person aggrieved. Requests for a variance under section 912³ and for special exception under section 913⁴ may be filed with the board by any landowner or any tenant with the permission of such landowner.

¹ Sections 10909 to 10912 of this title.

² Section 10908 of this title.

§10915. Time limitations; persons aggrieved

No person shall be allowed to file any proceeding with the board later than thirty days after any application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal of or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given. If such person has succeeded to his interest after such approval, he shall be bound by the knowledge of his predecessor in interest.

The failure of anyone other than the landowner to appeal from an adverse decision on a tentative or preliminary plan pursuant to section 709¹ or from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 1005(b)² shall preclude an appeal from a final approval except in the case where the final submission substantially deviates from the approved tentative or preliminary approval.

1968, July 31, P.L. 805, art. IX, § 915; 1972, June 1, P.L. —, No. 93, § 915, effective in 60 days.

¹ Section 10709 of this title.

² Section 11005 of this title.

§10916. Stay of proceedings

Upon filing of any proceeding referred to in section 914¹ and during its pendency before the board all land-development pursuant to any challenged ordinance, order or approval of the zoning officer or of any agency or body, and all official action thereunder shall be stayed unless the zoning officer or any other appropriate agency or body

¹ Section 10914 of this title.

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certifies to the board facts indicating that such stay would cause imminent peril to life or property, in which case the development or official action shall not be stayed otherwise than by a restraining order, which may be granted by the board or by the court having jurisdiction of zoning appeals on petition after notice to the zoning officer or other appropriate agency or body. When an application for development, preliminary or final, has been duly approved and proceedings designed to reverse or limit the approval are filed with the board by persons other than the applicant, the applicant may petition the court having jurisdiction of zoning appeals to order such persons to post bond as a condition to continuing the proceedings before the board. After the petition is presented the court shall hold a hearing to determine if the filing of the appeal is frivolous and is for the purpose of delay. At the hearing evidence may be presented on the merits of the case. After consideration of all evidence presented, if the court determines that the appeal is frivolous and is for the purpose of delay it shall grant the petition. The right to petition the court to order the appellants to post bond may be waived by the appellee but such waiver may be revoked by him if an appeal is taken from a final decision of the court. The question whether or not such petition should be granted and the amount of the bond shall be within the sound discretion of the court.

As amended 1978, Sept. 28, P.L. 785, No. 150, § 1, imd. effective.

ARTICLE X. APPEALS**§11001. Zoning appeals**

The proceedings set forth in this article shall constitute the exclusive mode for securing review of any ordi-

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nance, decision, determination or order of the governing body of a municipality, its agencies or officers adopted or issued pursuant to this act.

1972, June 1, P.L. —, No. 93, § 1001, effective in 60 days.

§11002. Venue

Appeals to a court shall be taken to the court of common pleas of the county in which the land involved is located.

1972, June 1, P.L. —, No. 93, § 1002, effective in 60 days.

§11003. Validity of ordinance; procedural questions

Questions of an alleged defect in the process of enactment or adoption of any ordinance or map shall be raised by an appeal taken directly from the action of the governing body to the court.

As affected 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978.

§11004. Validity of ordinance; substantive questions; landowner appeals

(1) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either:

(a) To the zoning hearing board for a report thereon under section 910¹ or 913.1;² or

(b) To the governing body together with a request for a curative amendment under section 609.1.³

(2) The submissions referred to in subsection (1) shall be governed by the following:

Publisher's Note: Footnotes not included in copy.

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(a) The landowner shall make a written request to the board or governing body that it hold a hearing on his challenge. The request shall contain a short statement reasonably informing the board or the governing body of the matters that are in issue and the grounds for the challenge. Such statement shall contain a certification that the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use; provided that this rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge.

As amended 1978, Oct. 5, P.L. 1067, No. 249, § 5, imd. effective.

(b) The request may be submitted at any time after the ordinance or map takes effect but if an application for a permit or approval is denied thereunder, the request shall be made not later than the time provided for appeal from the denial thereof. In such case, if the landowner elects to make the request to the governing body and the request is timely, the time within which he may seek review of the denial of the permit or approval on other issues shall not begin to run until the request to the governing body is finally disposed of.

(c) The request shall be accompanied by plans and other materials describing the use or development proposed by the landowner in lieu of the use or development permitted by the challenged ordinance or map. Such plans

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and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for evaluating the challenged ordinance or map in the light thereof. Nothing contained herein shall preclude the landowner from first seeking a final permit or approval before submitting his challenge to the board or governing body.

(d) If submission is made to the governing body under subsection (1)(b), the request shall be accompanied by an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein.

(e) Notice of the hearing required by sections 609.1, 910, or 913.1, whichever is applicable, shall include notice that the validity of the ordinance or map is in question and shall give the place where and the times when a copy of the landowner's request, including the plans submitted pursuant to subsection (2)(c) and the proposed amendments, if any, submitted under subsection (2)(d) may be examined by the public.

(f) The board or the governing body, as the case may be, shall hold a hearing upon the landowner's request pursuant to sections 609.1, 910, or 913.1, whichever is applicable, commencing not later than sixty days after the request is filed unless the landowner requests or consents to an extension of time.

(3) Repealed. 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978.

(4) For purposes of subsection (3)(ii), the landowner's request for a curative amendment is denied when (i) the

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governing body notifies the landowner that it will not adopt the amendment, or (ii) the governing body adopts another amendment which is unacceptable to the landowner, or (iii) the governing body fails to act on the landowner's request, in which event the denial is deemed to have occurred on the thirtieth day after the close of the last hearing on the request unless the time is extended by mutual consent between the landowner and the municipality.

1972, June 1, P.L. —, No. 93, § 1004, effective in 60 days.

Section 2(a)[1421] of Act 1978, April 28, P.L. 202, No. 53 [42 P.S. §20002(a)[1421]], provides, in part, as follows:

"After submitting his challenge to the board or governing body as provided in subsections (1) and (2) of section 1004 of the act [this section], the landowner may appeal a denial of the same to a court of competent jurisdiction. Failure to so appeal the denial of a request for a curative amendment shall not preclude the landowner from thereafter presenting the same validity questions by commencing a proceeding as provided in section 1004(1)(a) of the act [subsec. (1)(a) of this section]. The reference in section 1004(4) of the act [subsec. (4) of this section] to 'subsection (3)(ii)' shall be deemed a reference to the proceeding sentence."

§11005. Validity of ordinance; substantive questions; appeals by persons aggrieved

Persons aggrieved by a use or development permitted on the land of another by an ordinance or map or any provision thereof who desire to challenge its validity on

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substantive grounds shall first submit their challenge to the zoning hearing board for a report thereon under section 910.^[1]

The submission to the board shall be governed by the following:

(a) The aggrieved person shall submit a written request to the board that it hold a hearing on the challenge. The request shall contain a short statement reasonably informing the board of the matters that are in issue and the grounds for the challenge.

(b) The request shall be submitted within the time limitations prescribed by section 915.² In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he proposes to build is free from challenge, and recognizing that the procedure for preliminary approval of his development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under section 915 by the following procedure: (i) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance. (ii) If the zoning officer's preliminary opinion is that the use or devel-

¹ Section 10910 of this title.

² Section 10915 of this title.

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opment complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall include a general description of the proposed use or development and its location, by some readily identifiable directive, and the place and times where the plans and other materials may be examined by the public. The favorable preliminary opinion of the zoning officer shall be deemed to be a preliminary approval under section 915 and the time therein specified for commencing a proceeding with the board shall run from the time when the second notice thereof has been published.

(c) The board shall hold a hearing upon the aggrieved person's request pursuant to section 910, commencing not later than sixty days after the request is filed. If a hearing has been held by the governing body covering the same matters, at which a stenographic record has been taken, the board shall upon motion of any party accept said record as the record in the case before the board but the board shall not be precluded from taking additional evidence, unless such evidence ought to be excluded under section 908(6).³

After submitting his challenge to the board, as provided in clauses (a) and (b), any party aggrieved may take the same to court by appeal.

As affected 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978.

§11006. Applications, decisions and orders not involving the validity of an ordinance; landowner appeals

(1) A landowner who desires to file a zoning application or to secure review or correction of a decision or order

³ Section 10908 of this title.

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of the governing body or of any officer or agency of the municipality which prohibits or restricts the use or development of land in which he has an interest on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall proceed as follows:

(a) From a decision of the governing body or planning agency under a subdivision or land development ordinance the landowner may appeal directly to court or to the zoning hearing board under section 913.1¹ in cases where that section is applicable. If the municipality provides a procedure, formal or informal, for the submission of preliminary or tentative plans and adverse decision thereon shall, at the landowner's election, be treated as final and appealable.

(b) From the decision of the governing body or planning agency denying tentative approval of a development plan under section 709(3)² or, if tentative approval has been granted, from any adverse decision on an application for final approval, the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable.

(c) To the extent that the board has jurisdiction of the same under section 909³ all other appeals shall lie exclusively to the zoning hearing board.

(d) Applications under sections 912 and 913⁴ shall be made exclusively to the zoning hearing board.

(2) Appeals to the zoning hearing board pursuant to subsections (1)(a) and (1)(c) shall be filed within thirty days after notice of the decision is issued or, if no decision is made, within thirty days from the date when a decision is deemed to have been made under this act.

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(3)(a) Appeals to court may be taken by the landowner from any decision of the governing body or planning agency under subsections (1)(a) and (1)(b), after the decision is issued or, if no decision is made when a decision is deemed to have been made under this act.

(b) Appeals to court from any decision of the zoning hearing board may be taken by any party aggrieved.

As affected 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978.

§11007. Decisions and orders not involving the validity of an ordinance; appeals by persons aggrieved

Persons aggrieved by a use or development permitted on the land of another who desire to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which has permitted the same, on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall first submit their objections to the zoning hearing board under sections 909 and 915.¹ The submission shall be governed by the provisions of section 1005.²

Appeals to court from the decision of the zoning hearing board may be taken by any party aggrieved.

As affected 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978.

¹ Sections 10909 and 10915 of this title.

² Section 11005 of this title.

*Pennsylvania Municipalities Planning Code***§11008. Appeals to court; commencement; stay of proceedings**

(1) Zoning appeals shall be entered as of course by the prothonotary or clerk upon the filing of a zoning appeal notice which concisely sets forth the grounds on which the appellant relies. The appeal notice need not be verified. The zoning appeal notice shall be accompanied by a true copy thereof.

(2) Upon filing of a zoning appeal, the prothonotary or clerk shall forthwith as of course, send to the governing body, board or agency whose decision or action has been appealed, by registered or certified mail, the copy of the zoning appeal notice together with a writ of certiorari commanding said governing body, board or agency within twenty days after receipt thereof to certify to the court its entire record in the matter in which the zoning appeal has been taken, or a true and complete copy thereof, including any transcript of testimony in existence and available to the governing body, board or agency at the time it received the writ of certiorari.

(3) If the appellant is a person other than the landowner of the land directly involved in the decision or action appealed from, the appellant, within seven days after the zoning appeal is filed, shall serve a true copy of the zoning appeal notice by mailing said notice to the landowner or his attorney at his last known address. For identification of such landowner, the appellant may rely upon the record of the municipality and, in the event of good faith mistakes as to such identity, may make such service nunc pro tunc by leave of court.

(4) The filing of an appeal in court under this section, shall not stay the action appealed from but the appellants

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may petition the court having jurisdiction of zoning appeals for a stay. If the appellants are persons who are seeking to prevent a use or development of the land of another, whether or not a stay is sought by them, the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. After the petition is presented the court shall hold a hearing to determine if the filing of the appeal is frivolous and is for the purpose of delay. At the hearing evidence may be presented on the merits of the case. After consideration of all evidence presented, if the court determines that the appeal is frivolous and is for the purpose of delay it shall grant the petition. The right to petition the court to order the appellants to post bond may be waived by the appellee but such waiver may be revoked by him if an appeal is taken from a final decision of the court. The question of the amount of the bond shall be within the sound discretion of the court.

As amended 1978, Sept. 28, P.L. 785, No. 150, § 2, imd. effective.

§11009. Intervention

Within the thirty days first following the filing of a zoning appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Rules of Civil Procedure.¹

1972, June 1, P.L. —, No. 93, § 1009, effective in 60 days.

¹ 12 P.S. App.R.C.P. 1 et seq.

§11010. Hearing and argument of zoning appeal

If upon motion it is shown that proper consideration of the zoning appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence or may remand the case to the body, agency or officer whose decision or order has been brought up for review or may refer the case to a referee to receive additional evidence provided that appeals brought before the court pursuant to sections 1004 and 1005¹ shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact, or if additional evidence is taken by the court or by a referee, the court may make its own findings of fact based on the record below as supplemented by the additional evidence, if any.

1972, June 1, P.L. —, No. 93, § 1010, effective in 60 days.

§11011. Judicial relief

(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal, only if it determines that:

¹ Sections 11004 and 11005 of this title.

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(a) the municipality has not acted in good faith or made a bona fide attempt in the adoption of its ordinances or maps, or any amendments thereto, to meet the statutory and constitutional requirements for nonexclusionary zoning; or

(b) the ordinance imposes limitations that are not reasonably related to the municipality's authority to determine its physical growth pattern, protect the Commonwealth's public natural resources, coordinate development with the provision of public services, or protect the character of the community. Where municipalities have adopted a joint municipal comprehensive plan and enacted zoning legislation consistent with the joint municipal comprehensive plan within a region pursuant to Articles XI and XI-A,¹ the court, when determining the validity of a challenge to such a municipality's zoning ordinance shall consider the zoning ordinance or ordinances as they apply to the entire region and shall not limit its consideration to the application of the zoning ordinance within the boundaries of the respective municipalities.

(2) If the court, in accordance with the standards provided in subsection (1), finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings,

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including the adoption of alternative restrictions, in accordance with the court's opinion and order. In issuing its order the court shall consider the following: (i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist; (ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities; (iii) the suitability of the site for the intention of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features; (iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and (v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supple-

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mentary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(3) The fact that the plans and other materials referred to in subsection (1) are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (2)¹ and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

1972, June 1, P.L. —, No. 93, § 1011, effective in 60 days.

(4) No court shall grant or enforce relief with respect to a substantive challenge without first making an affirmative finding of fact that the landowner's certification required by section 1004(2)(a)² has in fact been made and is true and correct.

As amended 1978, Oct. 5, P.L. 1067, No. 249 §6, imd. effective.

§11012. Repealed. 1971, June 3, P.L. —, No. 6, § 1 (§ 509(a)(178))

¹ "(1)" in original.

(2)
No. 87-1969

Supreme Court, U.S.

FILED

JUN 25 1988

JOSEPH R. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

THE BOROUGH OF BERWICK, DANIEL DEFINNIS, SR.,
THOMAS METZ, CARMEN BUTERA, and
HERMAN DAVIDSON, Members of the Zoning
Hearing Board of the Borough of Berwick,

Petitioners,

vs.

GLEN M. NEIDERHISER and GREGORY C. BROWN,
t/a PROGRESSIVE ENTERPRISES,
t/a HOLLYWOOD STEREO AND VIDEO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

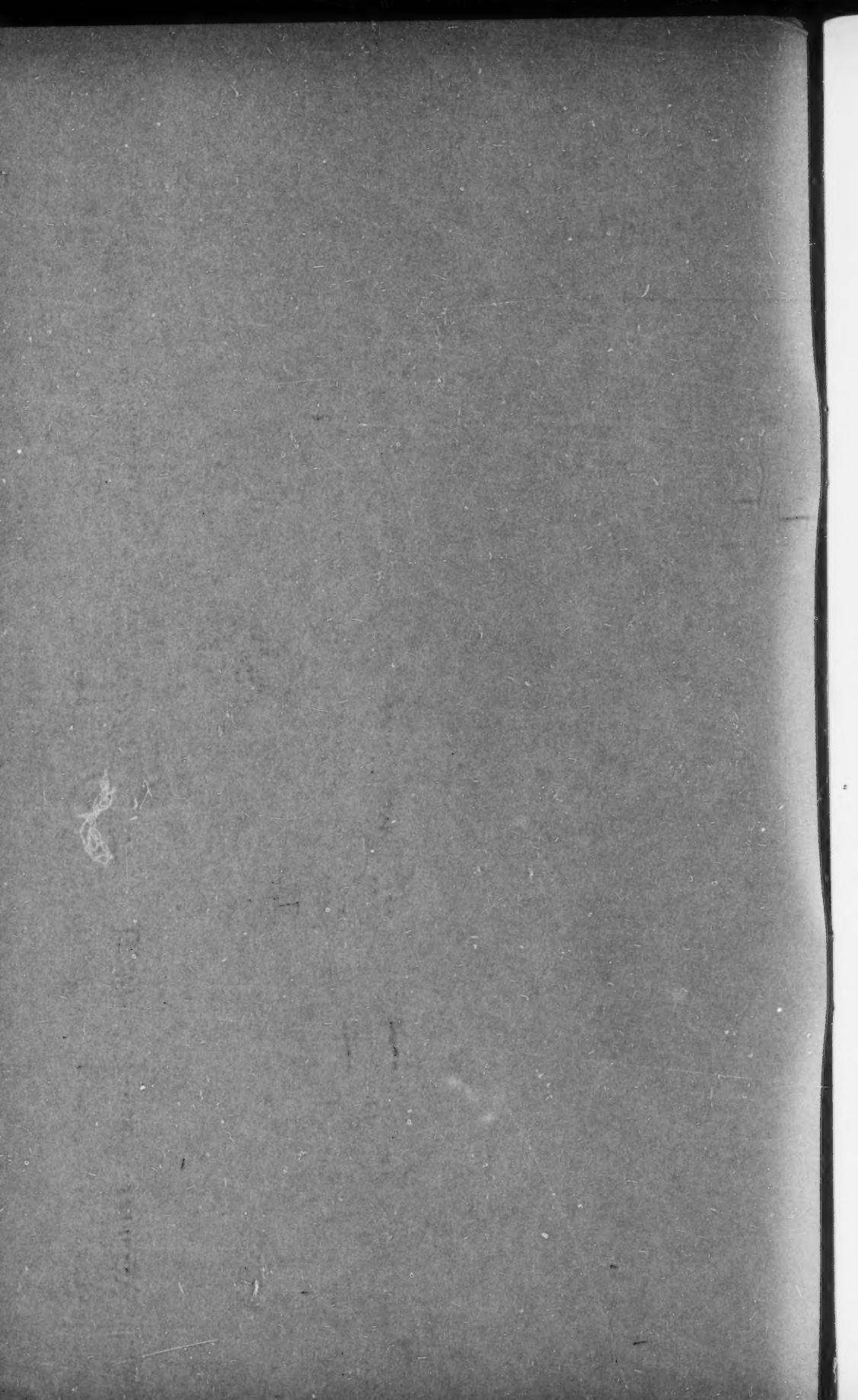
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i.

Questions Presented for Review

1. Whether the issues raised in the Petition for Writ of Certiorari were not considered by the courts below on their merits?

2. Whether the issues raised in the Petition for Writ of Certiorari were not raised in the courts below?

3. Whether it may not be necessary for the Supreme Court to reach the constitutional issues presented by the Petitioner?

4. Whether the unusual procedural posture of this case makes it inappropriate for the Supreme Court to grant a Writ of Certiorari?

5. Whether the case or controversy issue is not before the Supreme Court because it was not raised in Berwick's Petition for Writ of Certiorari?

6. Whether there exists no actual conflict between the Circuit Courts of Appeal?

7. Whether any important question of federal law has already been resolved by the Supreme Court of the United States and was followed by the Third Circuit Court of Appeals in the present case?



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IN THE
Supreme Court of the United States

October Term, 1987

No. 87-1969

THE BOROUGH OF BERWICK, DANIEL DEFINNIS,
SR., THOMAS METZ, CARMEN BUTERA, and
HERMAN DAVIDSON, Members of the
Zoning Hearing Board of the
Borough of Berwick,
Petitioners,

vs.

GLEN M. NEIDERHISER and GREGORY C. BROWN,
t/a PROGRESSIVE ENTERPRISES,
t/a HOLLYWOOD STEREO AND VIDEO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS

Counterstatement of the Case

Factual Background

On July 25, 1986, Hollywood Stereo and Video applied to the Zoning Hearing Board of the Borough of Berwick to secure a special exception to change the use of the

property it was renting from a pizza parlor to a home video rental store. Under Section 100-85 of the Berwick Zoning Ordinance (Petitioner's Appendix Pg. 41a) a pre-existing, non-conforming use can be changed as long as there is less than a 35 percent increase in area and as long as no additional dimensional nonconformities are created by the change. There was no dispute before the Zoning Board that the structure had pre-existing, non-conforming use status for commercial use; that the size of the structure would remain the same; and that no new dimensional nonconformities would be created. Despite meeting the objective criteria in the Zoning Ordinance for changing from one pre-existing, non-conforming use to another, the Berwick Zoning Hearing Board rejected Hollywood's application for special exception.

A review of the transcript (Respondent's Appendix Pgs. 1a-12a) indicates that a representative of Hollywood indicated that a portion of the video tape rentals would be adult or X-rated movies sold under controlled circumstances in a separate section of the store (Respondent's Appendix Pg. 2a). The following exchange took place before the Zoning Hearing Board when the special exception was denied:

"CARMEN BUTERA: In these videos that you are going to have, are they going to be rated or just family?

GREG BROWN: We carry all types of movies from childrens to adult entertainment.

CARMEN BUTERA: When you say adult, I don't want to sound facetious, is it going to have porno, hardcore?

GREG BROWN: There are X-rated movies, yes." (Respondent's Appendix Pgs. 1a-2a).

"DAN DEFINNIS: Greg, I want to be honest with you because you are a nice guy and I know you all my life, I am not in favor of the porno that goes with this store. If you were just selling movies, yes, I would say I want it, my principal is, I don't go for that and I can't deviate from what I believe in, I have nothing against you personally.

GREG BROWN: I understand that.

DAN DEFINNIS: What you are selling, I can't go for it.

GREG BROWN: There is all types of people out there in the world today, some people enjoy this and other don't. Some people enjoy comedy, horror movies, we give the selection for what they want, just as the other video stores do in town.

DAN DEFINNIS: I haven't voted for any other stores. We already had one come in and I voted against it in a residential area. It is not that I am picking on you, but this is my principal. I am not going any further." (Respondent's Appendix Pgs. 2a-3a).

"CARMEN BUTERA: I would like to ask you a question. Do you think the X-rated movies versus the family, what do you think the percentage of business it would bring you.

GREG BROWN: Biggest percentage of business would be the childrens and the normal movies, approximately 10 to 15 percent would be the other portion.

CARMEN BUTERA: Do you think the loss of that ten percent would create a financial hardship that would make this venture impractical?

GREG BROWN: It would definitely make a difference in the amount of business we do, yes.

CARMEN BUTERA: Would it alter your future of entering into the business or not?

GREG BROWN: I would like to discuss that with my partner, but personally, I think it would, yes.

CARMEN BUTERA: Any other questions?

DAN DEFINNIS: I would definitely be in favor if it is strictly eliminated, I would be in favor." (Respondent's Appendix Pgs. 7a-8a).

"CARMEN BUTERA: The change of use Mr. Brown, would not hinder in my opinion, but having the porno movies, I have to worry whether it would offend the town people, so we would like to check to see whether there is indeed a restriction how far away from church and school and then give you findings." (Respondent's Appendix Pg. 9a).

"GREG BROWN: Would it be considered if we decided not to have the X-rated movies?

CARMEN BUTERA: Oh yes, of course, I can't comment on that at this position." (Respondent's Appendix Pg. 12a).

Dissatisfied with the Zoning Board's decision, Hollywood appealed under Pennsylvania's Municipalities Planning Code, 53 P.S. 10101 *et seq.*, to the Court of Common Pleas of Columbia County, Pennsylvania. While the zoning appeal was pending Berwick and Hollywood attempted to resolve the matter by stipulating to the issuance of the special exception. The settlement agreement, at Paragraph No. 8 (Respondent's Appendix Pg. 14a), required compliance by Hollywood with Berwick's Obscenity Ordinance No. 1158 (Petitioner's Appendix Pg. 67a). Paragraph No. 8 stated:

"The Appellant shall comply with the Borough of Berwick Ordinance No. 1158 with respect to pornography and will not operate and maintain the premises as an Adult Book Shop or Adult Firm [sic] Viewing Premises."

Hollywood refused to execute the agreement because it believed that Ordinance No. 1158 was unconstitutional. In the meantime, on April 22, 1987, the Court of Common Pleas of Columbia County reversed the decision of the Zoning Hearing Board because the Board had not made findings of fact and conclusions of law, and remanded the matter for further proceedings. On May 13, 1987, the Zoning Hearing Board granted the special exception, and Hollywood opened for business in June, 1987.

After settlement negotiations broke down Hollywood filed an action under 42 U.S.C. 1983 in the United States District for the Middle District of Pennsylvania. The complaint (Respondent's Appendix Pgs. 16a-22a) consisted of three counts:

1. A declaratory judgment action seeking to declare the Borough of Berwick's obscenity ordinance unconstitutional and to enjoin its enforcement (Paragraph No. 16, Respondent's Appendix Pg. 20a).

2. An injunctive action seeking to restrain the enforcement of Ordinance 1158 on equal protection grounds¹ (Paragraph No. 18, Respondent's Appendix Pg. 21a).

3. A cause of action for money damages relating to the denial of the zoning permit for first amendment and due process reasons (Paragraph No. 19, Respondent's Appendix Pg. 21a).

Berwick did not challenge the sufficiency of the recitation of the causes of action in the complaint under F.R.C.P. 12(b)(6), and filed a responsive pleading. On April 15, 1987, Hollywood filed a motion for summary

¹ The second cause of action based on Equal Protection was not pursued by Hollywood.

judgment relating only to the causes of action dealing with the unconstitutionality of Ordinance No. 1158. The Borough of Berwick filed no cross motion for summary judgment, but raised in its reply brief an alleged lack of case or controversy. The district court, without prior notice to the parties and without a complete factual record addressing the case or controversy issue, dismissed not only the count relating to Ordinance 1158, but the complaint in its entirety,² including the damage count which was not before the district court for consideration.

The Third Circuit Court of Appeals found that a case or controversy existed with respect to the cause of action relating to the unconstitutionality of Ordinance No. 1158 because of the attempt by the Borough of Berwick to condition the issuance of the zoning permit upon compliance with the ordinance (Opinion of Third Circuit—Petitioner's Appendix Pg. 4a). The Third Circuit also found that a case or controversy existed with respect to the claim for damages resulting from the delay in opening its business because the complaint alleged that the special exception was denied because of the content of the video tapes and not on zoning grounds, in violation of the freedom of speech clause of the first amendment and the due process clause of the fourteenth amendment (Opinion of the Third Circuit, Petitioner's Appendix Pg. 4a).

² The Third Circuit found this procedure improper but nevertheless addressed the case or controversy issue on the merits (Petitioner's Appendix Pg. 9a).

DISCUSSION

1. The Issues Raised in the Petition for Writ of Certiorari Were Not Considered by the Courts Below on Their Merits.

The decision on the merits by the Third Circuit Court of Appeals deals only with the case or controversy issue (Petitioner's Appendix Pg. 16a). Because the sufficiency of the cause of action was not raised by the Borough of Berwick, neither the Third Circuit Court of Appeals nor the district court ruled on the merits of the sufficiency of the cause of action. The Supreme Court will not consider the merits of a claim upon which the court of appeals, in view of its disposition of the case, did not pass. *Calmar S. S. Corp. v. United States*, 345 U.S. 446, 73 S.Ct. 733, 97 L.Ed. 1140 (1953). Accordingly, since the matters raised by the Borough of Berwick in its Petition for Writ of Certiorari were not passed on or decided by the courts below, the Petition for Writ of Certiorari should be denied.

2. The Issues Raised in the Petition for Writ of Certiorari Were Not Raised in the Courts Below.

In its Petition for Writ of Certiorari the Borough of Berwick argues, for the first time, the insufficiency of the allegations of the cause of action and that the district court should have abstained.

The Defendant Borough of Berwick did not file a motion pursuant to F.R.C.P. No. 12(b)(6) challenging the cause of action, and did not file a motion for summary judgment pursuant to F.R.C.P. No. 56 after facts were developed through discovery. For the first time Berwick alleges that abstention would have been appropriate in this case, after failing to request the district court to abstain. Because these issues were not raised in the courts below, they should not form the basis for granting the Borough of Berwick's Petition for Writ of Certiorari.

In addition, it should be clear from the record before this Court that the doctrine of abstention would not have applied to the facts of this case even if the issue had been raised in the courts below. There was no pending criminal action brought by the Borough under Ordinance No. 1158 which would require the federal court to have abstained as required by *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971) and *Pennzoil Companies v. Texaco*, 481 U.S. _____, 107 S.Ct. 1519, 95 L.Ed.2d 1, 55 USLW 4457 (1987). See also *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

When the motion for summary judgment was decided, there were no pending state actions, since the zoning appeal was decided in favor of Hollywood Stereo and Video, and the only issue remaining under the damage cause of action was whether Hollywood's constitutional rights were violated and the amount of damages over the nine-month period during which the Respondents were prevented from opening their business. The state court decision did not present the case in a different posture as required by *R. R. Commission v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941).

Since this case does not deal with the details of zoning regulations, no complex state regulating scheme is involved, as in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

3. It May Not be Necessary for the Supreme Court to Reach the Constitutional Issues Presented by the Petitioner.

The Petition for Writ of Certiorari filed by the Borough of Berwick deals only with the due process violation as found by the Third Circuit Court of Appeals when it addressed the case or controversy issue. It does

not address the determination by the Third Circuit that a zoning permit cannot, under the first amendment, be denied because of the subject matter of the material sold or rented in the business.

If the Petition for Certiorari were denied and the district court were to find in favor of the Plaintiff because of violation of its first amendment rights, the Supreme Court would not have to address the constitutional issue with regard to the due process clause, and the Court's principle of avoiding constitutional determinations, unless necessary, could be followed. Furthermore, issues not raised in the Petition cannot be considered by this Court.

4. The Unusual Procedural Posture of this Case Makes It Inappropriate for the Supreme Court to Grant a Writ of Certiorari.

Because of the unique procedural posture of this case, it would be inappropriate for the Supreme Court to grant a Writ of Certiorari. The case or controversy issue upon which the Third Circuit decided the case was raised *sua sponte* by the United States District Court for the Middle District of Pennsylvania, without notice to the parties and without the opportunity to develop a factual issue on the question of case or controversy. Because of this unique posture, the record below could not be fully developed, and this Court should not review a case without having a proper record to form the basis for a thorough analysis.

5. The Case or Controversy Issue is Not Before the Supreme Court Because it was Not Raised in Berwick's Petition for Writ of Certiorari.

The Borough of Berwick did not raise the case or controversy issue in its Petition for Writ of Certiorari, so it cannot be addressed by the Supreme Court. *F. D. Rich*

Co. v. United States, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974); *United Brotherhood of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958).

6. There Exists No Actual Conflict Between the Circuit Courts of Appeal.

An analysis of the Third Circuit's opinion and the cases relied upon by the Petitioner show that the Third Circuit followed well established principles enunciated by the Supreme Court of the United States and that no actual conflict exists among the circuits. The Third Circuit, in its opinion (Petitioner's Appendix Pg. 4a), specifically found that the Plaintiff's complaint recited a cause of action for violations of Hollywood's rights under the freedom of expression clause of the first amendment and the due process clause of the fourteenth amendment.

The Third Circuit simply stated that the first amendment of the United States Constitution prohibits the denial of a zoning permit because of the content of protected materials rented in a business, and that the due process clause of the fourteenth amendment prohibits the denial of a zoning permit based solely on the subject matter of the materials rented in the business, absent applicable zoning considerations.

This Court, in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), held that there are two elements to an action brought pursuant to 42 U.S.C. 1983: conduct under the color of state law; and deprivation of rights guaranteed by the Constitution of the United States. The Third Circuit, in its opinion (Petitioner's Appendix Pg. 4a), specifically found that the Plaintiff's Complaint recited a cause of action for violations of Hollywood's rights under the freedom of expression clause of the first amendment and the due process clause of the fourteenth amendment.

The Third Circuit's ruling is consistent with the decisions of other circuits when civil rights actions are based upon specific constitutional violations. See: *Griffin v. Burns*, 570 F.2d 1065 (C.A. 1, 1978); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (C.A. 2, 1986); probable jurisdiction noted, 477 U.S. 903, 106 S.Ct. 3270, 91 L.Ed.2d 561 (1986), rev'd 481 U.S. _____, 107 S.Ct. 1519, 95 L.Ed.2d 1, 55 USLW 4457 (1987); *Burt v. Abel*, 585 F.2d 613 (C.A. 4, 1978); *In Re Selcraig*, 705 F.2d 789 (C.A. 5, 1983); *O'Quinn v. Manuel*, 773 F.2d 605 (C.A. 5, 1985); *Shamie v. City of Pontiac*, 620 F.2d 118 (C.A. 6, 1980); *Colaizzi v. Walker*, 542 F.2d 969 (C.A. 7, 1976), cert. denied, 430 U.S. 960, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977); *New v. City of Minneapolis*, 792 F.2d 724 (C.A. 8, 1986); *Chalmers v. City of Los Angeles*, 762 F.2d 753 (C.A. 9, 1985); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (C.A. 9, 1979); *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790 (C.A. 9, 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (C.A. 10, 1984), cert. granted and vacated, *City of Lawton, Oklahoma v. Lusby*, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985), cert. denied, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985); *Vinyard v. King*, 728 F.2d 428 (C.A. 10, 1984); *Rittenhouse v. De Kalb County*, 764 F.2d 1451 (C.A. 11, 1985), reh'g denied, 773 F.2d 1239 (C.A. 11, 1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). Where a civil rights action is based upon vague proof or allegations of violations of constitutional rights or where the only complaint is a violation of state law, the circuit courts are uniform in refusing to recognize such causes of action under 42 U.S.C. 1983. Where complaints recite specific constitutional violations, the cause of action is recognized, and where the complaints do not recite violations of the federal Constitution the causes of action are not recognized.

The cases relied upon by the Petitioner all deal with circumstances where no finding of a specific constitutional violation was either alleged or found. In *Raskiewicz v. Town of New Boston*, 754 F.2d 38 (C.A. 1, 1985), cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L.Ed.2d 111 (1985) the First Circuit recognized that federal courts do not sit as super zoning hearing boards and refused to find a cause of action where there were loose claims of conspiracy and corruption. *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (C.A. 1, 1983) deals with the refusal to issue a permit when all requirements of state law were met. There were no allegations of violation of federal constitutional rights. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (C.A. 1, 1982), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982) involves speculation as to federal constitutional rights violations. *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (C.A. 1, 1984), another First Circuit case deals, with rights under applicable state law. *Cloutier v. Town of Epping*, 714 F.2d 1184 (C.A. 1, 1983) involved a multi-faceted zoning dispute with no specific allegations or proof of violation of any federal constitutional rights.

World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (C.A. 9, 1987), a Ninth Circuit case, deals solely with an abstention issue where a pending criminal action filed by the state justified abstention. In *Rymer v. Douglas County*, 764 F.2d 796 (C.A. 11, 1985) the Eleventh Circuit refused to find a civil rights cause of action because a building permit was issued on allegedly unsuitable land because of the availability of state remedies and because of the lack of allegations of violations of federal constitutional rights. *Meredith v. Talbot County, Maryland*, 828 F.2d 228 (C.A. 4, 1987), a Fourth Circuit case, deals solely with

abstention, where there were no allegations of federal constitutional rights. Similarly, *Shelton v. City of College Station*, 780 F.2d 475 (C.A. 5, 1986), cert. denied, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1987) found no cause of action alleging a civil rights violation because traffic problems created by a proposed pool hall were a legitimate reason to deny the zoning permit under the applicable zoning ordinance.

The holdings of the Third Circuit Court of Appeals are consistent with these cases when no recitation of federal rights is involved. See *Rogin v. Bensalem Township*, 616 F.2d 680 (C.A. 3, 1980); *Miller & Son Paving Inc. v. Wrightstown Township Civic Association*, mem. 595 F.2d 1213 (C.A. 3, 1979), aff'g. 443 F.Supp. 1268 (E.D. Pa. 1978), cert. denied, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979). The Petitioner argues that the Third Circuit's decision in *Hollywood* is inconsistent with its ruling in *Cohen v. City of Philadelphia*, 736 F.2d 81 (C.A. 3, 1984). To the contrary, *Cohen* is consistent with the Third Circuit's rulings in *Rogin* and *Miller* as well as being consistent with the rule of law established throughout the circuits when no federal constitutional rights violations are alleged. The Fourth Circuit Court of Appeals in *Scott v. Greenville County*, 716 F.2d 1409 (C.A. 4, 1983) reached a similar conclusion to the Third Circuit Court of Appeals in *Hollywood* because the court found sufficient allegations of violations of federal constitutional rights.

The decision of the Third Circuit was in accordance with the decisions of the Supreme Court of the United States, its own precedents, and rulings throughout the circuit courts where specific violations of federal constitutional rights are found. There exists no conflict as asserted by the Petitioner.

7. Any Important Question of Federal Law has Already Been Resolved by the Supreme Court of the United States and Was Followed by the Third Circuit Court of Appeals in the Present Case.

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) establishes the requirement of allegations or proof of a deprivation of federal constitutional rights. The federal courts have long had the power to interfere with state administrative boards' decisions for "irrationality or arbitrariness" where there is no legitimate reason for the administrative decision. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979). See *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). This Court has held that the first amendment protects businesses that deal in protected materials. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *National Association for Advancement of Colored People v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). See, also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). In *Ginzburg v. United States*, 383 U.S. 463, 474, 86 S.Ct. 942, 16 L.Ed.2d 31, 40 (1966), the Court cited the "frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

The Petitioner's reliance upon *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) is misplaced. The present case deals with well established definitions of constitutional rights. There is no need to prove that governmental action "shocks the conscience" when well

established constitutional rights have been violated. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) found no liberty or property interests in being free from defamatory remarks. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) deal with liberty interests in being free from the intentional or negligent destruction of property by state officials. The present case deals with well established constitutional rights and state-defined liberty interests.

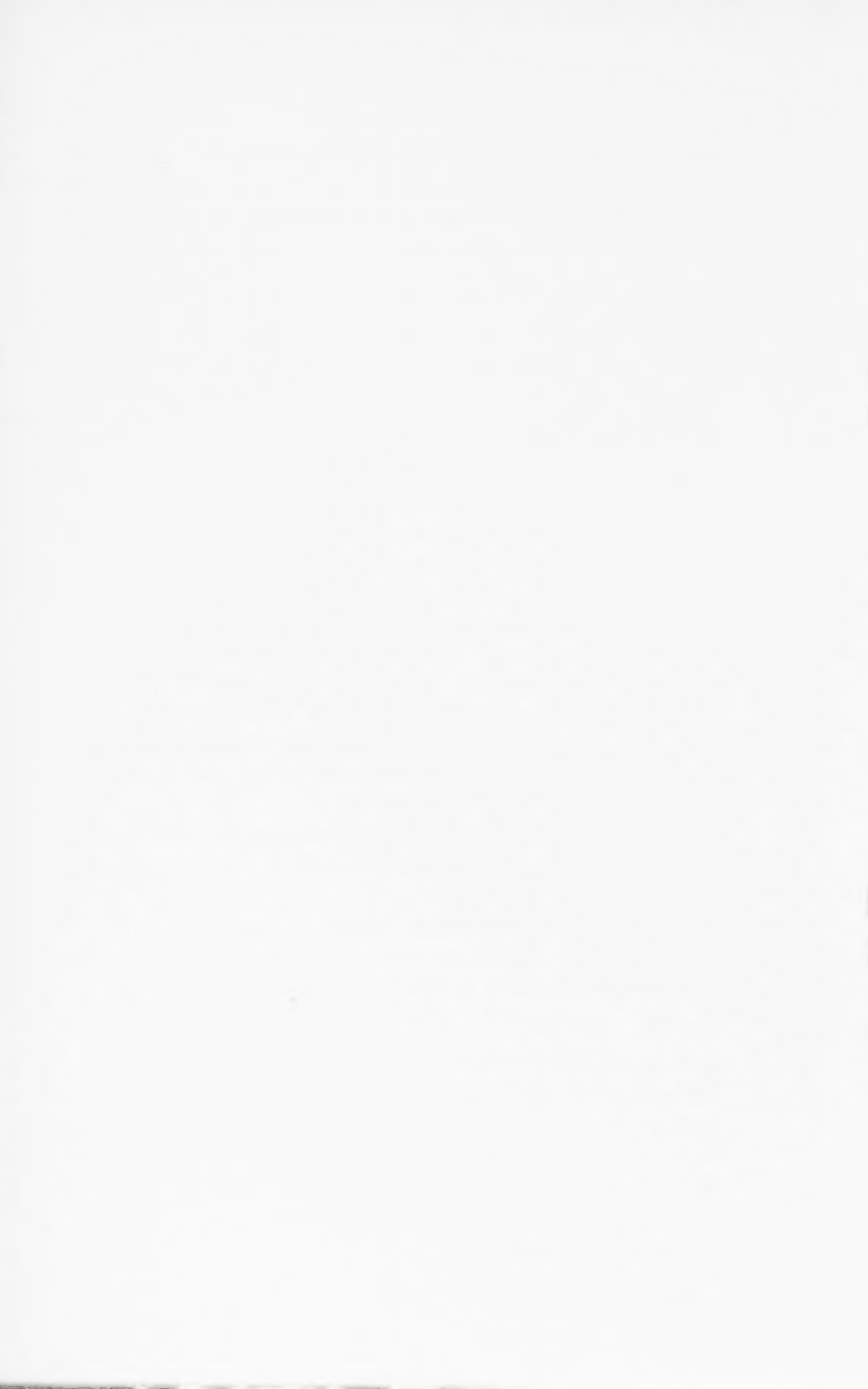
Conclusion

For these reasons Berwick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. MIHALIK, ESQ.*
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APPENDIX
Transcript of Zoning Hearing Board
ZONING HEARINGS
AUGUST 7, 1986
7:00 P.M.

RECEIVED
Aug 27 1986
Borough of Berwick

CASE NO. 1—HOLLYWOOD VIDEO & STEREO

PREPARED BY: Lisa Marie Orlando

CARMEN BUTERA: This meeting will come to order, Berwick Zoning Hearing, August 7, 1986, 7:00 p.m. In attendance: Carmen Butera, Dan DeFinnis, Thomas Metz, Herman Davidson, Karen Hampton—Codes Officer, Attorney for Council, Attorney Torsella. The first case on our agenda for tonight is the Hollywood Video & Stereo, who is representing them, would you please come up and be sworn in by our Secretary.

—GREG BROWN SWORN—

CARMEN BUTERA: Would you tell us a little bit of what you do and your application?

GREG BROWN: We would like to open a video rental and retail store at 906 Market Street. The business is basically to rent prerecorded movies for home entertainment.

CARMEN BUTERA: In these videos that you are going to have, are they going to be rated or just family?

GREG BROWN: We carry all types of movies from childrens to adult entertainment.

CARMEN BUTERA: When you say adult, I don't want to sound facetious, is it going to have porno, hardcore?

GREG BROWN: There are X-rated movies, yes.

CARMEN BUTERA: Any questions.

DAN DEFINNIS: You want a pizza parlor with it?

GREG BROWN: Do I want a pizza parlor?

CARMEN BUTERA: NO, NO

GREG BROWN: There was one there.

CARMEN BUTERA: This is at 906 Market Street.

DAN DEFINNIS: Just a video store alone you want?

GREG BROWN: Exactly, right. The adult movies are kept in a private location that noone else can see. People have to be at least 18 years of age to be admitted or to rent that type of movie.

CARMEN BUTERA: Any questions?

THOMAS METZ: What kind of hours?

GREG BROWN: We open every day, except for Sunday, ten in the morning and close at 9:00 at night. Sunday we open at 12 noon and close at seven.

THOMAS METZ: Are you going to have any aluminated signs?

GREG BROWN: Yes, I already purchased it.

CODES OFFICER: It is not aluminated, is it?

GREG BROWN: That will be aluminated, yes on the building, secured.

DAN DEFINNIS: Greg, I want to be honest with you because you are a nice guy and I known you all my life, I am not in favor of the porno that goes with this store.

...DAN DEFINNIS: If you were just selling movies, yes, I would say I want it, my principal is, I don't go for that and I can't deviate from what I believe in, I have nothing against you personally.

GREG BROWN: I understand that.

DAN DEFINNIS: What you are selling, I can't go for it.

GREG BROWN: There is all types of people out there in the world today, some people enjoy this and other don't. Some people enjoy comedy, horror movies, we give the selection for what they want, just as the other video stores do in town.

DAN DEFINNIS: I haven't voted for any other stores. We already had one come in and I voted against it in a residential area. It is not that I am picking on you, but this is my principal. I am not going any further.

HERMAN DAVIDSON: I have a few questions. You just stated that you are going to have a lighted sign on the building?

GREG BROWN: That is correct.

HERMAN DAVIDSON: In the request for a Special Permit, there is no mention of any sign in there.

GREG BROWN: For the Special Exception, I had to apply for that because I did not know when we entered in the lease with ITS that the building was in a residential area. I assumed for the last 30 years, as long as I can remember there has always been commercial activity and then Ms. Hampton came out and told me, after I had purchased the permits for remodeling and for a sign approximately five days to a week after I had purchased the permits, that it was a residential area and that I

should apply for a Special Exception so I came in to apply for a Special Exception to use a commercial business in a residential area.

HERMAN DAVIDSON: When you say a lighted sign, what type of sign do you mean, background lighting, flashing lights?

GREG BROWN: No flashing lights, a soft white light, back and side sign, 2 feet x 5 feet two of them, one on each side of the building.

HERMAN DAVIDSON: Do you have any letters from any neighbors in the area for or against or any thing, or any correspondence from any of the neighbors in the immediate area.

GREG BROWN: No, I don't.

HERMAN DAVIDSON: Is there a church in the area within 2 to 3 blocks?

GREG BROWN: Not to my knowledge.

HERMAN DAVIDSON: Is there a school in the area?

GREG BROWN: The closest school would be Fourteenth Street School.

HERMAN DAVIDSON: I seemed to recall there was a school in there.

CARMEN BUTERA: Four blocks away and there is a church about a block and one-half. School up the street and up on Pine Street, I believe there is a Baptist Church.

GREG BROWN: May I ask why you ask these questions?

HERMAN DAVIDSON: I believe, I am not certain, there may be an Ordinance, you can't if you are within so many feet of a church or school.

GREG BROWN: You can't what?

HERMAN DAVIDSON: You can't put this type of business in there.

GREG BROWN: This is not a video gameroom business.

HERMAN DAVIDSON: I realize what it is, I understand. Did anybody point out to you the standards for a Special Exception?

CODES OFFICER: He is asking if I did.

GREG BROWN: No she didn't.

HERMAN DAVIDSON: In the Zoning Ordinance it specifically states what Special Exception can be granted in a residential zone and I believe this is a R-2 zone and in the criteria, if anybody wants to look at it, it is 100-16 B, that criteria is all we can base our decision on these terms and exactly what we can allow in the area. I would suggest that somebody maybe should have explained in a little more detail.

GREG BROWN: May I ask when this was written?

HERMAN DAVIDSON: 1969 I believe.

GREG BROWN: Probably at that particular time, they did not have prerecorded movies. We are asking for a Special Exception, maybe it should be given consideration.

HERMAN DAVIDSON: Oh it will be given consideration. All I am saying is that the Special Exceptions listed here that we can allow, do not allow for retail sales for a R-2 area. I don't care what kind of business it is, I am saying retail sales or commercial business are not allowed in a R-2 area, according to what is listed under Special Exception and Permitted Uses.

J. TORSELLA: The area that you propose to occupy is that consisted of 28 feet x 35 feet?

GREG BROWN: Yes.

J. TORSELLA: Does the lease agreement have provision for parking?

GREG BROWN: Yes, as far as parking, the entire area off to the side, a good 75 feet by 200 feet is permissible for us to use for our customers to park.

J. TORSELLA: To the south of the building?

GREG BROWN: Yes.

J. TORSELLA: Offstreet parking?

GREG BROWN: Yes.

J. TORSELLA: Are you familiar with what business was in the building prior to your proposed use?

GREG BROWN: Yes, previous to us was a pizza parlor.

JOSEPH F. TORSELLA: When did that close?

GREG BROWN: Approximately four weeks ago, a little longer, more like six to eight week ago.

JOSEPH F. TORSELLA: Is there water, sewage, fire and police protection there?

GREG BROWN: Yes.

JOSEPH F. TORSELLA: Your application for a Special Exception, did you prepare the application?

GREG BROWN: Yes I did.

JOSEPH F. TORSELLA: In Number 2 of the application—movie rentals for family entertainment, is that correct?

GREG BROWN: Yes.

JOSEPH F. TORSELLA: That did not indicate you proposed to have adult movies and other adult family entertainment?

GREG BROWN: Yes.

JOSEPH F. TORSELLA: You indicated you have a sign permit, when did you bring the permit application?

GREG BROWN: I don't have the permit with me as far as the exact date, about six weeks ago.

JOSEPH F. TORSELLA: When you presented that application for permit, did that show that there would be alumination on the sign.

GREG BROWN: No that didn't come up, I didn't know there was a difference, whether it be aluminated, or it wasn't. I just assumed, again the business that is attached right to it is the Food Bag, plenty of aluminated lights there. I just assumed that it was a commercial area and it would be permissible to do it as I stated before that Ms. Hampton approached me that it was a residential area, so we immediately filled out application for Special Exception.

CARMEN BUTERA: I would like to ask you a question. Do you think the X-rated movies versus the family, what do you think the percentage of business it would bring you.

GREG BROWN: Biggest percentage of business would be the childrens and the normal movies, approximately 10 to 15 percent would be the other portion.

CARMEN BUTERA: Do you think the loss of that ten percent would create a financial hardship that would make this venture impractical?

GREG BROWN: It would definitely make a difference in the amount of business we do, yes.

CARMEN BUTERA: Would it alter your future of entering into the business or not?

GREG BROWN: I would like to discuss that with my partner, but personally, I think it would, yes.

CARMEN BUTERA: Any other questions?

DAN DEFINNIS: I would definitely be in favor if it is strictly eliminated, I would be in favor.

CODES OFFICER: Mr. Brown did in fact come in for a building permit at the time I issued the permit.

J. F. TORSELLA: If you are going to testify, you must be sworn.

CARMEN BUTERA: Did you wish to table this until you found out whether there is an Ordinance restricting this type of business in the confines of the church or the school?

J. F. TORSELLA: Before you move to table, Ms. Hampton wants to testify.

—KAREN HAMPTON SWORN—

J. F. TORSELLA: Or if anybody else wants to testify.

CODES OFFICER: Mr. Brown had workers out working at his building and I drove by one day and I saw they didn't have a building permit, so I stopped and the gentlemen in there were kind enough to call Mr. Brown and tell him he needed a building permit. At the time I issued the building permit, sign permit, I just assumed that the steps had already been taken that that was a commercial area and it was only when I got back to my office and checked is when I realized that it was residential. I did approach him about it and I said it was not a commercial, with a nonconforming structure and I am the one that advised him that according to 165-85

you can in fact grant Special Exception for a change of use and that is why he is here. The bit about no I did not explain to him any guidelines, I just assumed, and maybe I should just stop assuming and consult Mr. Davidson more that we are just changing use, because we had in this Borough for quite awhile, where people just automatically keep going into different locations and keep changing and we never caught up with it and now we are going to catch up with it, as public record that in fact is our nonconforming use and every time they want to change them, they have to come in for a Special Exception for a change of use.

CARMEN BUTERA: The change of use Mr. Brown, would not hinder my opinion, but having the porno movies, I have to worry whether it would offend the town people, so we would like to check to see whether there is indeed a restriction how far away from church and school and then give you the findings.

DAN DEFINNIS: I think we could come to a decision tonight. I'll tell you why. About six months ago we had a meeting here and they gave a permit for an video like he is running near the calvery church, I didn't vote for it, of course, but they were given it the same night, with the other guys on the Board before you two guys came, or three, they were given that permit to go in, less than one-half block near the church. Same block. I don't think there is any reason to delay and postpone thinking because we done to much of that, we have had four or five hearings that we tabled and they are back again, I think we should be man enough to stand up for our convictions, if you have any, if you don't, vote accordingly.

CARMEN BUTERA: It is not that we don't have our convictions, but we would like to give our applicant every opportunity to present their position.

DAN DEFINNIS: Definitely, I think we have.

CARMEN BUTERA: I cannot act unless there are motions on the floor.

DAN DEFINNIS: Make motion that we deny request.

J. TORSELLA: No . . .

DAN DEFINNIS: Now look Joe, you are not our attorney, you are the Borough's attorney, not ours, you are not our attorney but we will get one.

CARMEN BUTERA: He protects Council.

DAN DEFINNIS: If Council has to pressure us into everything that we do, if it is good or bad.

CARMEN BUTERA: You have to make findings of fact first, and then you could make your motion. He is not telling you otherwise. Make your findings of fact Dan and if you want to pursue that motion, that is your preference. Attorney Torsella has been telling you this for six months.

DAN DEFINNIS: I made a motion, we don't need any more findings of facts, you guys know better than that, where are you Herman, you are the one always looking for facts, don't you have any now?

HERMAN DAVIDSON: Motion was made was there any second?

CARMEN BUTERA: No second. Motion dies.

HERMAN DAVIDSON: Mr. Chairman, I have a question with an interpretation of one of our Ordinances here. Maybe you can straighten me out on it. It is on 100-95 B 3. This is the application of extent of use regulations. If I interpret this paragraph correctly, it states that we are limited to what is listed under

permitted and special uses. If my interpretation is correct, if you agree that this interpretation is correct, then I would make some findings of fact.

CARMEN BUTERA: Make your findings of fact.

HERMAN DAVIDSON: Motion for finding of fact that under Paragraph 100-11 B subparagraphs (1) through (8), that no where within these paragraphs is there any indication that any sort of commercial sales can be allowed under this Special Exception.

CARMEN BUTERA: Motion on the floor. Do I hear a second. I will second that.

Questions?

All in favor signify by saying Aye: Herman Davidson, Tom Metz, Carmen Butera

Obstained: Dan DeFinnis.

HERMAN DAVIDSON: Make a motion for finding of fact under Paragraph 100-16 B (1) through (7) and within the subparagraph there are no indications of an allowance of a commercial business or movie-type business allowed within this area.

CARMEN BUTERA: SECOND? I'll second that.

Questions?

All in favor signify by saying aye: Herman Davidson, Tom Metz, Carmen Butera

DAN DEFINNIS: Obstained.

HERMAN DAVIDSON: Motion that we deny the application of Hollywood Video and Stereo for their Special Permit at 906 Market Street.

CARMEN BUTERA: Second.

Questions?

All in favor signify by saying Aye. Herman Davidson, Tom Metz, Carmen Butera, Dan DeFinnis.

CARMEN BUTERA: Mr. Brown, Our Codes Officer will be sending you a letter indicating that your application has been denied.

GREG BROWN: Would it be considered if we decided not to have the X-rated movies?

CARMEN BUTERA: Oh yes, of course, I can't comment on that at this position.

Stipulation of Settlement

IN THE COURT OF COMMON PLEAS
OF THE 26TH JUDICIAL DISTRICT
COLUMBIA COUNTY BRANCH, PA.

CIVIL DIVISION
ZONING APPEAL

GLEN M. NEIDERHISER and GREGORY C. BROWN,
t/a PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO,

Appellant,

vs.

THE ZONING HEARING BOARD OF
THE BOROUGH OF BERWICK,

Appellee.

No. 906 of 1986

STIPULATION OF SETTLEMENT

1. On or about July 25, 1986, Progressive Enterprises, t/a Hollywood Stereo and Video, filed an application with the Zoning Hearing Board of the Borough of Berwick to convert a Pizza Parlor, situate at 906 Market Street, Berwick, Penna. to rentals of video tapes, films and equipment.

2. On or about August 7, 1986, after hearing before the Zoning Hearing Board of the Borough of Berwick, the application of the Appellant was denied.

3. On or about August 20, 1986, the Appellant filed this Appeal to the decision of the Zoning Hearing Board of the Borough of Berwick.

4. The parties hereto have reached an agreement on resolution of the issues and sign this Stipulation to end and terminate all litigation relating to the application before the Zoning Hearing Board and the ruling by the Zoning Hearing Board, and the Appeal filed hereof.

5. The Applicant shall be permitted to conduct the business of Hollywood Stereo and Video Retail Sale and Rentals at the premises situate at 906 Market Street, which was formerly occupied as a Pizza Parlor and Luncheon Room.

6. The Applicant shall not place any signs or lighting on the premises which do not conform to the Borough of Berwick Zoning Ordinance.

7. Appellant, Progressive Enterprises t/d/b/a Hollywood Stereo and Video, before operation of any signs on the premises will file application with the Zoning Hearing Board pursuant to provisions of Section 165-72 of the Borough of Berwick Zoning Ordinance.

8. The Appellant shall comply with the Borough of Berwick Ordinance No. 1158 with respect to pornography and will not operate and maintain the premises as an Adult Book Shop or Adult Film Viewing Premises.

9. Each party will pay its own separate cost.

10. Upon signing of this Stipulation by the Attorneys and approval by the parties, the parties consent to the Court entry of an Order authorizing Progressive Enterprises t/d/b/a Hollywood Stereo and Video, Inc. to

operate a retail stereo and video rental and sale shop at 906 Market Street in the Borough of Berwick under terms and conditions set forth herein.

JOSEPH F. TORSELLA, ESQ., on
behalf of the Zoning Hearing Board of
the Borough of Berwick, Appellee

JOHN MIHALIK, ESQ., on behalf
of Glen M. Neiderhiser and
Gregory C. Brown, t/a
Progressive Enterprises, t/a
Hollywood Stereo and
Video, Appellant

CARMEN BUTERA, Chairman Zoning
Hearing Board of the
Borough of Berwick

GLEN M. NEIDERHISER

GREGORY C. BROWN

**Complaint Filed in U.S. District Court
IN THE UNITED STATES DISTRICT COURT
IN THE MIDDLE DISTRICT
OF PENNSYLVANIA**

**GLEN M. NEIDERHISER and GREGORY C. BROWN,
t/a PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO,**
Plaintiff,

vs.

**THE BOROUGH OF BERWICK; DANIEL
DEFINNIS, SR.; THOMAS METZ; CARMEN
BUTERA; and HERMAN DAVIDSON, members of
the Zoning Hearing Board of the Borough of Berwick,**
Defendant.

Civil No. _____

COMPLAINT

The Plaintiffs by their Attorney John A. Mihalik, Esq. of HUMMEL, JAMES & MIHALIK file this Complaint against the Defendant upon causes of action whereof the following is a statement:

INTRODUCTORY STATEMENT

1. The Plaintiffs file this civil rights action against the Borough of Berwick and the individual members of its Zoning Hearing Board because of their refusal to

grant a special exception to the Plaintiffs because their videotape business sells a certain number of x-rated movies and because of the attempt by the Borough to impose upon the Plaintiffs an unconstitutional ordinance purporting to regulate adult book stores.

JURISDICTIONAL STATEMENT

2. This Court has jurisdiction of this matter by reason of 28 U.S.C. 1331 in that it is an action brought pursuant to a federal statute 42 U.S.C. 1983. The Plaintiffs also appeal to the Courts general equity jurisdiction and seek relief under the Declaratory Judgment Act 28 U.S.C. 2201.

PARTIES

3. The Plaintiffs are individuals engaged in the business of owning videotape rental stores and their principle place of business is located at 1001 Old Berwick Road, Bloomsburg, Columbia County, Pennsylvania.

4. The Defendant, the Borough of Berwick is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania having its corporate offices at Borough Hall, Market Street, Berwick, Columbia County, Pennsylvania.

5. Daniel DeFinnis, Sr. is an adult individual residing at 206 East Second Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

6. Thomas Metz is an adult individual residing at 1641 Fairview Ave., Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

7. Carmen Butera is an adult individual residing at 370 Monroe Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

8. Herman Davidson is an adult individual residing at 1132 Orange Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

FACTUAL ALLEGATIONS

9. The Plaintiffs entered into a lease dated June 30, 1986 to rent premises located at 906 Market Street, Berwick, Pennsylvania for use as a store to sell videotapes, video equipment and related supplies.

10. The property is commercial in nature and had been used prior to the enactment of the zoning ordinance of the Borough of Berwick for various commercial uses and has pre-existing nonconforming status under the applicable law of the Commonwealth of Pennsylvania and the Zoning Ordinance of the Borough of Berwick.

11. On July 25, 1986 the Plaintiffs applied for a special exception to change the use of the premises from one nonconforming use to another nonconforming use and on August 13, 1986, the Zoning Hearing Board of the Borough of Berwick and the individual Defendants named above denied the request for special exception.

12. The Plaintiffs' application met all requirements of the law of the Commonwealth of Pennsylvania and of the Zoning Ordinance of the Borough of Berwick and the application was denied because a portion of the videotape rentals involved x-rated movies.

13. The actions of the individual Defendants were in the furtherance of the stated policy of the Borough of Berwick and it is further alleged that the Borough of Berwick had the opportunity to correct the constitutional violations alleged herein but adopted and ratified the decision of the members of the Zoning Hearing Board.

14. In addition, the Borough of Berwick has indicated its intent to impose upon the Plaintiff the provisions of Borough of Berwick Ordinance No. 1158 regulating adult book shops or adult film viewing premises.

DAMAGES

15. As a result of the refusal of the Defendants to grant the Plaintiff the special exception, the Plaintiffs have suffered the following damages in excess of \$10,000.00.

A. Attorney's fees to secure the special exception in the Courts of the Commonwealth of Pennsylvania.

B. Lost profits from September 1, 1986 through the eventual issuance of the Special Exception and Zoning Permit.

C. Costs related to the rental of the structure prior to the eventual granting of the special exception.

COUNT I

ADULT BOOK STORE ORDINANCE NO. 1158

FREEDOM OF SPEECH/DUE PROCESS

GLEN M. NEIDERHISER and
GREGORY C. BROWN, t/a
PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK

16. Ordinance No. 1158 violates the Plaintiffs' right to Freedom of Expression under the First and Fourteenth amendments of the United States Constitution and violates their right to Substantive Due Process because the ordinance is unconstitutionally vague; serves no legitimate governmental purpose and has no rational basis.

WHEREFORE, the Plaintiff requests the following relief:

- A. Monetary damages in excess of \$10,000.00
- B. Declaratory Judgment against the Defendant the Borough of Berwick declaring ordinance No. 1158 unconstitutional.
- C. That an injunction be issued enjoining the enforcement of said ordinance.
- D. Attorney fees and costs.
- E. Such other relief which is just and reasonable.

ADULT BOOK STORE ORDINANCE NO. 1158

EQUAL PROTECTION

GLEN M. NEIDERHISER and
GREGORY C. BROWN, t/a
PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK

17. It is alleged that there are other locations in the Borough of Berwick that sell x-rated material and said ordinance has not been enforced nor applied against such other locations.

18. Accordingly, the Plaintiffs have been denied Equal Protection of Law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, the Plaintiff requests the following relief:

- A. Monetary damages in excess of \$10,000.
- B. That an injunction be issued enjoining the enforcement of said ordinance.
- C. Attorney's fees and costs.
- D. Such other relief which is just and reasonable.

GLEN M. NEIDERHISER and
GREGORY C. BROWN, t/a
PROGRESSIVE ENTERPRISES, t/a
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK; DANIEL
DEFINNIS, SR.; THOMAS METZ; CARMEN
BUTERA; and HERMAN DAVIDSON

19. It is alleged that the individual Defendants by denying the Plaintiff's request for special exception and the adoption of said decision by the Defendant, the Borough of Berwick has deprived the Plaintiffs' of Freedom of Expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE, the Plaintiffs request the following:

A. Monetary damages in excess of \$10,000.

B. That the Defendant be directed to issue to the Plaintiff a special exception and zoning permit permitting the change of use from one pre-existing nonconforming use to another.

C. An award of attorney's fees and costs.

JOHN A. MIHALIK, ESQUIRE

